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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES E. GAVETTE, Appellant, DOCKET NUMBER CH03538810382 v. DEPARTMENT OF THE TREASURY, DATE: _____ Agency.	)

Lynn H. Shecter, Esquire, Roy, Shecter, and Vocht, Birmingham, Michigan, for the appellant.

John Freeman, Esquire, Cincinnati, Ohio, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

Chairman Levinson issues a separate opinion.

OPINION AND ORDER

This case is before the Board upon both the agency's and the appellant's petitions for review of the administratiave judge's August 19, 1988 initial decision, ordering the agency, inter alia, to consider the appellant for promotions in accordance with his restoration rights. For the reasons discussed in this Opinion and Order, the Board DENIES the agency's petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. The Board GRANTS the appellant's petition for review, however, and AFFIRMS the initial decision as MODIFIED by this Opinion and Order, still REVERSING the agency

action.

BACKGROUND

The appellant, a GS-12, Revenue Service Agent with the Internal Revenue Service (agency), appealed to the Chicago Regional Office of the Board, alleging, inter alia, that the agency failed to inform him of his restoration rights, improperly refused to restore him to duty by not promoting him to a GS-13 "CEP Team Coordinator" position, and discriminated against him based on age and physical handicap.

This appeal arose out of a series of events spanning several years. On September 7, 1979, the agency initialed the filing of a claim with the Department of Labor, Office of Workers'

Compensation Programs (OWCP), for benefits for the appellant based on emotional illness caused or aggravated by his employment. See Appeal File, Tab 25. The "Official Superior Officer's Report of Occupational Disease" that accompanied the application indicated that the appellant first reported his condition to his supervisor on August 3, 1979, and discontinued August 30, 1979. Id. On April 29, 1981, OWCP denied the appellant benefits. However, on August 13, 1982, it granted him retroactive benefits from August 3, 1979, to May 7, 1982. Id.

Meanwhile, in 1980, the agency applied, on the appellant's behalf, to the Office of Personnel Management (OPM)

for disability retirement, which the appellant opposed. OPM initially denied the application in April 1981 but subsequently granted it, upon reconsideration, in February 1982. The appellant appealed OPM's reconsideration decision to the Board, which sustained that agency's determination. See Gavette v. Office of Personnel Management, 20 M.S.P.R. 180 (1984).

In an unpublished opinion, the United States Court Appeals for the Federal Circuit reversed the Board's decision, finding that the agency's failure to furnish the appellant certain material he requested, which the agency had submitted to OPM upon its request for reconsideration, and the agency's

failure to certify that there were no available positions to which the appellant could be reassigned, constituted harmful procedural error. See Gavette v. Office of Personnel Management, 765 F.2d 158 (Fed. Cir. 1985) (table); No. 84-1286, slip op. at 8, 11; Appeal File, Tab 18. In his appeal to the Federal Circuit, the appellant initially requested reinstatement to his former position but subsequently abandoned that claim and opted for disability retirement instead. See Gavette, slip op. at 11. The court therefore remanded the case to the Board, directing that the appellant be awarded the difference between the amount of pay he would have received had

he remained in active duty status and the amount of the amount of disability retirement pay he had received up to the date of judgment (February 1, 1985), as well as any other relief to which the appellant was entitled. Id. at 12.

On December 23, 1985, the appellant filed for OWCP benefits for disabling emotional illness commencing on January 25, 1985. See Appeal File, Tab 15. The appellant asserted that his condition was caused by the agency's involuntary disability retirement action and subsequent administrative and judicial proceedings relating to his difficulties with the agency. OWCP denied that claim on June 24, 1986, but subsequently granted it on September 16, 1987, for

the period from January 25, 1985, until January 8, 1986, when it found that the appellant was able to work without limitation based on a January 20, 1986 medical report from his psychiatrist, Dr. Warren Goodwin. Id.

On January 27, 1986, the appellant applied to the agency for restoration. See Appeal File, Tab 1, Exhibit B. On February 20, 1986, the agency denied his request on the basis that he was still disabled and that it had no available revenue agent positions. Id., Exhibit C. Following OWCP's September 16, 1987 approval of his 1985 claim for benefits, the appellant renewed his request for restoration by filing a copy of his previous January 27 request,

which the agency received on October 13, 1987. Id., Exhibit D. The appellant asserted that he had recovered within one year of the onset of his January 25, 1985 injury. On March 30, 1988, the agency also denied this restoration request, which is the subject of the instant appeal.

Subsequent to the appellant's filing of the petition for appeal in the present case, the parties entered into a settlement agreement, effective June 1, 1988, in a related civil action filed by the appellant against the agency in the United States District Court for the Eastern district of Michigan (C.A. No. 84-CV-4109-DT). See Appeal File, Tab 15; "Stipulation for Compromise Settlement."[1]

Initial Decision

After duly noting the parties' stipulations, the administrative judge found that the agency failed to

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[1] The agreement provided in pertinent part in paragraph 8 II as follows:

The SECRETARY (of the Department of the Treasury] understands that MR. GAVETTE reserves any and all rights which may have accrued to him as a federal employee under the United States Department of Labor, Employment Standards Administration, Office of Worker's Compensation Programs (OWCP) as well as pursuant to 5 U.S.C. §8151 and Federal Personnel Manual Chapter 353, including any right of Equal Employment Discrimination Complaints with respect to alleged IRS violation of any and all rights pursuant to 5 U.S.C. §8151 and Federal Personnel Manual Chapter 353.

The agency moved to dismiss the appellant's appeal based on the settlement agreement. The administrative judge denied the motion, finding that the "parties expressly reserved any rights that may have accrued to appellant under 5 U.S.C.A. §

8151(b)(1) (West 1980) and Chapter 353 of the Federal Personnel Manual for review by the Board." Appeal, File, Tab 14; "Order Concerning Timeliness of Appeal, Denying Agency's Motion to Dismiss, and Establishing Close of Record Date" at 1-2. The agency has not challenged this ruling on review.

establish that it had complied with 5 U.S.C. § 8151(b)(1)[2] in considering the appellant for all promotions at the GS-13 grade level or higher, based on his qualifications. Specifically, he found that: (1) In light of 5.U.S.C. § 8151, the February I, 1985 Federal Circuit decision constructively restored the appellant from May 7, 1982, when his initial OWCP benefits ceased, to the date of the court's judgment (February 1, 1985); (2) the agency could not collaterally attack OWCP's September 16,

1987 determination that the appellant had suffered a recurrent illness due to an employment-related factor because, under 5 U.S.C. § 8149, the Secretary of Labor is exclusively charged statutorily with the responsibility for making such determinations;

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[2] 5 U.S.C. § 8151 (b)(1) provides in pertinent part that, consistent with implementing regulations of the Office of Personnel Management:

> (1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as

> all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the right to tenure, promotion, and safeguards in reductions-in-force procedures

(Emphasis supplied.)

(3) under 5 U.S.C. § 8151(b)(1) and Hogg v. United States Postal Service, 29 M.S.P.R. 153 (1985), the appellant was therefore entitled to attendant restoration rights because he had overcome a compensable disability within one year of the commencement of benefits for its recurrence; under 5 C.F.R. 353.301 (1987), which was in effect at the pertinent times concerned, the appellant was entitled to consideration for all promotions for which he would

have been considered but for his absence based on his compensable injury; (5) because there was nothing in 5 C.F.R. § 353.201 to limit an employee's consideration for promotion only to the period during which he received OWCP compensation, the agency was required to also consider the appellant for promotions after January 8, 1986, through the date he applied for restoration, October 13, 1987; (6) under Withers v. Department or the Air Force, 28 M.S.P.R. 379, 385 (1985), and Phillips v. Department of Transportation, 22 M.S.P.R. 223, 227 (1984), the agency was also required to consider the appellant for promotions nationwide or indicate why it was

precluded from giving such consideration; (7) the appellant failed to prove age discrimination because, although he established that he was over 40 years of age, and was thus in the protected age group, he did not show that age was a factor in the agency's actions; and (8) the appellant also did not prove handicap discrimination because, although he showed he was a handicapped individual, he did not show that he was a qualified handicapped person because he failed to produce evidence of the performance requirements for the GS-13 Team Coordinator position, to which he asserted he was entitled to be promoted, or to show that he was qualified for, and able to perform, the

duties of that position. Accordingly the administrative judge ordered, inter alia: that the agency consider the appellant for any GS-13 position or higher for which he would have been considered, had he been present, for the period fro- January 25, 1985, through October 13, 1987; and that the agency "make every effort to restore [the] appellant to an acceptable higher graded position if such restoration would be in accord with the agency's merit promotion plan." See Initial Decision at 19.

The Parties' Petitions for Review

The agency petitions for review, contending that the administrative judge erred in: (1) Considering evidence submitted by the appellant to which it

did not have an opportunity to respond; (2) finding that the appellant was entitled to benefits under 5 U.S.C. § 8151; (3) finding that section 8151 required it to consider the appellant for competitive promotions; and (4) finding that section 8151 required the agency to consider the appellant for competitive promotions before he claimed compensation benefits.

The appellant has also petitioned for review, contending that the administrative judge erred in: (1) Finding that, because the appellant failed to establish the performance requirements for the GS-13 Team Coordinator position, he did not prove that he was qualified to perform the

duties of that position; (2) finding that the appellant failed to prove his allegation of handicap discrimination; (3) stating that, in its decision on the appellant's involuntary retirement appeal, the Federal Circuit constructively restored the appellant to his position from May 7, 1982, when his first period of compensation payments ceased, until February 1, 1985, the date of the court's judgment; and (4) prescribing an illusory remedy in ordering the agency to consider him for promotions. The agency has responded to the appellant's petition, challenging his contentions.

ANALYSIS

The Agency's Petition for Review The Administrative Judge's Establishment of Separate Dates for Receipt of the Parties' Final Submissions Did Not Prejudice the Agency's Substantive Rights.

First, the agency contends that the administrative judge erroneously considered evidence submitted by the appellant to which it did not have an opportunity to respond. The agency challenges the administrative judge's August 2, 1988 order governing the parties' final written submissions. See Appeal File, Tab 14. The agency contends that the order required that the agency's final submissions be sent

by express mail on or before August 12, 1988, but required that the appellant's final submissions be sent, also by express mail, to the administrative judge, on or before August 16, 1988. The appellant's submissions were to have been received by the board and the agency no later than August 17, 1988. Id. The agency argues that the order, in effect, permitted the appellant to review and respond to the agency's submissions but denied the agency a similar opportunity. It asserts that the initial decision was issued on August 19, 1988, but that it did not receive a copy of the appellant's submissions until on or about August 29, 1988, and did not receive all of the

attachments to the appellant's submissions until September 8, 1988. It further asserts that the administrative judge relied on unspecified new and material evidence in the submissions, i.e., an April 15, 1988 letter from OPM's Chicago office.

Under 5 C.F.R. § 1201.41, an administrative judge is required to conduct fair and impartial proceedings and is endowed with broad discretionary authority in executing this mandate. In a case such as the instant one, where the appellant waives a hearing, the record closes on the date set by the administrative judge as the final date for the receipt of submissions by the parties. 5 C.F.R. § 1201.58(b) The

deadline for closing the record is within the sound discretion of the administrative judge. See Schultz v. Consumer Product Safety Commission, 10 M.S.P.R. 104, 106 (1982). However, where an appeal is decided without a hearing, the procedures utilized must comport with the basic requirements of fairness and notice, including an opportunity for one party to respond to the opposing party's submissions. Id. Thus, where one party is precluded from responding to material evidence which is included in the opposing party's submission, and upon which the administrative judge relies in the initial decision, such error may warrant reversal of the initial decision. Id.

We note that the agency does not assert, and the record does not indicate, that the agency objected to the different deadlines set by the administrative judge for the receipt of the parties' final submissions. See White v. Department of the Army, 32 M.S.P.R. 600 (1987) (a party cannot wait until after adjudication to object to the administrative judge's rulings). Further, even assuming that the administrative judge erred in this regard, the agency has not shown how the administrative judge's consideration of this evidence prejudiced its substantive rights. See Karapinka v. Department of Energy, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error

is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

As previously noted, the agency has not identified the specific key evidence upon which it asserts the administrative judge relied. See Aistrup v. Department of Transportation, 18 M.S.P.R. 299, 300 n.2 (1983) (5 C.F.R. § 1201.115 requires that a petition for review set forth specific objections to the initial decision). Moreover, our review of the OPM letter (see Appeal File, Tab 18, Exhibit D), indicates that it merely informed the appellant of his restoration rights under the Federal Personnel Manual and former and existing OPM regulations. The agency was at all

times aware of the appellant's contention that it had improperly failed to consider him for promotions in relation to his restoration rights and could easily have obtained similar information in its preparation of its case by reviewing those regulations. Since this information could have been in the agency's possession, it was not new. See Santiago v. Department of the Air Force, 3 M.S.P.R. 457, 459 (1980). Therefore, the agency has not shown a basis upon which the administrative judge's ruling should be reversed.

The Appellant Was Entitled to Restoration Rights Based on the 1985 Recurrence of His Injury.

Next, the agency contends that the

administrative judge erred in finding that the appellant was entitled to benefits under 5 U.S.C. § 8151 based on his 1985 injury. The agency argues that the administrative judge erred in stating that it asserted that the appellant's 1985 injury was not job-related. See Initial Decision at 10. It argues that it asserted, instead, that, while the injury was employment-related, it neither occurred on the job nor was a recurrence of a compensable injury, but was due to stress related to the appellant's "ongoing legal proceedings." Agency's petition for Review at 9, Review File, Tab I. We find this argument unpersuasive inasmuch as OWCP had

already determined that the injury was a recurrence of the appellant's previous compensable injury and the fact OWCP's determination triggered the appellant's restoration rights. See Watson v. Department of the Army, 21 M.S.P.R. 435, 437 (1984); Hardin v. Department of the Army, 18 M.S.P.R. 42, 45 (1983).

The Agency Was Required to Consider the Appellant for Competitive Promotions Pursuant to 5 U.S.C. 8151(b)(1) and 5 C.F.R. § 353.201(a).

The agency also contends that the administrative judge erred in finding that 5 U.S.C. § 8151 required it to consider the appellant for competitive promotions. It argues that the parties' stipulation that the appellant had been

restored to his position of Revenue Agent (GS-12, step 13, journeyman level), and had been awarded all within-grade salary increases for which he would have been eligible, satisfied restoration requirements. See Appeal File, Tab 15, "Stipulation for Compromise Settlement" at 1. The agency contends further that the appellant bore the burden of proving that he would have been considered for competitive promotions under OPM regulations in effect at the pertinent time period and that he would have been selected for those promotions. In support of this contention, the agency relies on Naekel v. Department of Transportation, 850 F.2d 682 (Fed. Cir. 1988) and Boese v.

Department of the Air Force, 784 F.2d 388, 390 (Fed. Cir. 1986).

We find Naekel and Boese inapposite inasmuch as they do not concern the restoration rights of employees following a compensable injury under 5 U.S.C. 8151(b)(1) and 5 C.F.R. Part 353. Rather, they involve the employees' reinstatement rights following reversal or mitigation of adverse actions effected under 5 U.S.C. Chapter 75. We note that there is no provision in Chapter 75 and its implementing regulations, nor in the Back Pay Act, 5 U.S.C. § 550.801 et seq., that grants employees any right to promotion consideration during the period they are off the agency's rolls. Thus, in Naekel

and Boese, the court rejected the employees' contention that they were entitled to promotion rights and benefits, finding that, in the absence of a provision of law mandating a promotion during the period the employees were off the agencies' rolls, or the employees' clear showing that they would have been promoted, they were not entitled to promotion. See Naekel, 850 F.2d at 683-84; Boese, 784 F.2d at 390.

Under 5 U.S.C. § 8151(b)(1), however, an agency is required to accord a restored employee any promotion rights he would have had but for his compensable injury or disability. See note 2, supra. Additionally, 5 C.F.R. §

353.201(a) (1987) provides in pertinent part that "[e]ach agency shall consider every employee absent because of compensable injury or military duty for all promotions for which he would be considered were he not absent." The regulation does not require actual promotion, only consideration for promotions. There is no requirement that regulation that the employee prove that he would have been considered or selected for any promotion. As administrative judge correctly pointed out, See Initial Decision at 11, it is the agency that bears the burden proving that it has complied with the restoration requirements of 5 C.F.R Part 353. See Metsopulos v. United States

Postal Service, 33 M.S.P.R. 536, 539 (1987); Whitfield v. United States Postal Service, 5 M.S.P.R. 239, 242 (1981).

We stated in Whitfield at 242, that, "[c]onsistent with the agency's burden of proof in appeals before the Board, 5 U.S.C. § 7701(c)(1), the agency must submit evidence regarding all such available positions, and any restrictive qualification requirements" to show that it complied with 5 C.F.R. part 353. The statutory provision at issue in Metsopulos and Whitfield was 5 U.S.C. § 8151(b)(2), which concerns the agency's obligations in restoring an employee who takes longer than one year to overcome a compensable injury or disability.

However, 5 U.S.C. § 8151(b)(1), with which we are concerned here, imposes an additional burden on the agency to show that it considered for applicable promotions an employee who recovered within one year from a compensable injury or disability. See note 2, supra. The administrative judge properly found that the agency did not meet its burden of showing that it considered the appellant for promotions. See Initial Decision at 14.

Agency Was Required to Consider the Appellant for Competitive Promotions Nationwide From the Date of the Recurrence of the Appellant's Injury Until the Date the Agency Permitted Him to Return to Work.

The agency contends that the administrative Judge erred in finding that 5 U.S.C. § 8151 required it to consider the appellant for competitive promotions both before he claimed compensation benefits and after those benefits ceased. Specifically, it contends that the administrative judge erroneously required it to consider the appellant for competitive promotions from the time of his disabling condition in January 1985, but before he sought compensation benefits on December 23, 1985, and after those benefits ceased.

We find no merit to this contention. The appellant was entitled to restoration rights and benefits for "the entire time during which [he] was

receiving compensation" for his injury, i.e., January 25, 1985, to January 8, 1986. See 5 U.S.C. § 8151(a). The agency has cited to no authority requiring otherwise.

Since OWCP did not grant the appellant's claim based on recurrence of a compensable injury until September 17, 1987, the appellant could not have applied for restoration based on the recurrence of his injury prior to that time, as there was no finding of a compensable injury upon the recovery of which the right to restoration attached. See 5 U.S.C. § 8151(a); 5 C.F.R. § 353.201 and § 353.303 (1987); Johnson v. United States Postal Service, 29 M.S.P.R. 138, 140 (1985) (entitlement to

restoration rights is based upon a showing that the employee suffered a compensable injury); Cox v. U.S. International Trade Commission, 6 M.S.P.R. 336, 337-38 (1981) (where OWCP does not officially notify an employee that an injury is compensable until after the employee has recovered, the employee's application for restoration upon receipt of such notice is timely). Also, OWCP's delay cannot operate to defeat an employee's right to restoration where the employee is not responsible for the delay. Id. at 338. Here, the appellant applied for restoration within 30 days of receiving September 16, 1987 determination granting his claim. See Appeal File,

Tab 1, Exhibit D. Therefore, his appeal was timely, and he was entitled to restoration immediately. See 5 C.F.R. § 353.302(b) (1987).

We disagree with the administrative judge's finding that the agency was required to consider the appellant for promotion only up to the date he applied for restoration, October 13, 1987. Under 5 U.S.C. § 8151(b) (1), the appellant was entitled to consideration for promotion just as he would have been "had he not been injured or disabled." See note 2, supra. Had the appellant not been disabled, he would not have been in a non-duty status between January 25, 1985, and the date the agency permitted him to return to work.

Thus, he was entitled to consideration for promotions for that period as though he had not been absent because of his compensable injury. Id. Also, the agency was required to consider the appellant for promotions on a nationwide basis. See Withers v. Department of the Air Force, 28 M.S.P.R. at 385 (an agency is required to consider both partially and fully recovered employees for restoration to suitable positions on a nationwide basis).

Further, we note that, in paragraph 2 of their "Stipulation for Compromise Settlement," the parties agreed that the agency would cancel the appellant's disability retirement and reinstate him to his GS-12 Revenue Agent position, as

if he had remained on active duty, and would afford him attendant rights and benefits. See Appeal File, Tab 15. The agreement expressly provided that the appellant reserved to himself "any and all rights" to which he would be entitled as a Federal employee, including his rights under OWCP, 5 U.S.C. § 8151, and Chapter 353 of the Federal Personnel Manual. Id., note 1, supra. Thus, under the agreement, the appellant was not precluded from pursuing his restoration rights.

The Appellant's Petition for Review The Appellant Failed to Meet His Burden of Proving Handicap Discrimination Because He Failed to Show that He was a Qualified Handicapped Individual.

As to his petition for review, the appellant first contends that the administrative judge erred in ruling that he failed to show the performance requirements for the Team Coordinator position. He asserts that the agency failed to produce job descriptions and produced only the required qualifications for the position and the job postings. He argues that an employee has no duty to inform an agency of the performance requirements for its own position; that the qualifications listed in the announcement for the vacancy for that position stated its duty requirements; that his 18 years of satisfactory service demonstrated experience and skill, thus relieving him

from any obligation to show special competency or skill; and that, since the administrative judge acknowledged that he (appellant) was placed on the promotion roster, he should have found that the appellant was qualified for promotion.

The administrative judge's finding that the appellant failed to produce evidence of the performance requirements for the GS-13 Team Coordinator position related to the issue of whether the appellant had shown that he was a qualified handicapped person. See Initial Decision at 17-18. Thus, we will address this contention together with the appellant's contention that the administrative judge erred in finding

that he failed to prove handicap discrimination. Since the appellant alleged handicap discrimination, it was he, and not the agency, that had the burden of proof on this issue. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981) (although the burden of persuasion in an employment discrimination case is always on the employee, the burden of going forward with the evidence shifts; the employee has the initial burden to establish a prima-facie case; the burden then shifts to the employer to rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for its action; finally, the burden shifts back to the employee to show that the

employer's articulated reason is merely a pretext for prohibited discrimination).

In Savage v. Department of the Navy, 36 M.S.P.R. 148, 152 (1988), the Board, while recognizing that the elements necessary to establish a prima facie case of handicap discrimination may vary according to the particular facts and circumstances of a case, stated that, generally, an appellant can establish a prima facie case of handicap discrimination by: (1) A showing that he is a handicapped person and that the action appealed to the Board was based on his handicap; (2) to the extent possible, articulation of a reasonable accommodation under which the appellant

believes he could perform the essential duties of his position or of a vacant position to which he could be reassigned.

In the instant case, the parties do not dispute the administrative judge's finding that the appellant was a handicapped individual within the meaning of 29 C.F.R. § 1613.702(a). See Initial Decision at 16-17. However, we find no evidence that the agency's failure to promote the appellant to the GS-13 position was based on his handicap. In fact, the agency specifically stated in its March 30, 1988 letter that it was denying the appellant restoration because his 1985 injury was unrelated to his earlier

compensable injury and, therefore, did not invoke restoration rights. See Appeal File, Tab I; Exhibit A. Further, even assuming that the agency action in failing to consider the appellant for the GS-13 position was based on his handicap, we find that the appellant failed to make out a prima facie case of handicap discrimination because he did not show that he was qualified for the position. We reject the appellant's contention that, because he had been placed on the promotion roster, the administrative judge should have found him qualified. Even if the appellant met the experience and educational requirements for promotion to the GS-13 position in 1979,[3] since he was claiming

handicap discrimination, he was required to show that, despite his handicap,[4] he could perform the essential duties of the G5-13 position with or without reasonable accommodation. See 5 C.F.R. § 1613.702(f). The appellant did not meet this burden. See Appellant's Petition for Review at 1-2.[5]

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[3] The appellant contends that, as part of the June 1, 1988 settlement agreement with the agency, he was entitled, based on the agency's past discriminatory practices against him, to retraining as an accommodation to make him current on changes in the law and in IRS procedures during his nine year absence from the agency. See Appellant's Petition for Review at 4-5, Review File, Tab 3. We note that the agency challenges this assertion, stating that the retraining related only to the appellant's absence, and not to any discrimination based on a handicapping condition. See Agency's Response to Appellant's Petition for Review at 6-7; Review File, Tab 5. Moreover, a review of the agreement

shows that the provision relating to training did not refer to accommodation, but, rather, stated that the appellant would receive the same training as is given to individuals new to the position of revenue agent. See Appeal File, Tab 15, para. 2.

[4] The appellant was required to show, as part of his burden of establishing a prima facie case of handicap discrimination, that he was mentally qualified for the position. See Savage, 36 M.S.P.R. at 152. The only medical evidence submitted by the appellant was the January 8, 1986 report by Dr. Goodwin, stating that the appellant had fully recovered from his emotional illness. See Appeal File, Tab 15. The report related solely to the appellant's ability to perform the duties of the GS-12 Revenue Agent position. Thus, it did not establish that the appellant could perform the duties of the GS-13 Team Coordinator position or any other GS-13 position.

[5] In his petition for review, the appellant contends that the qualifications for the GS-13 position were stated in an announcement referenced by the administrative judge. A copy of this announcement is not included in the record, however. While the appellant states that the

administrative judge specifically refers to the announcement in the initial decision, citing to the record, we note that the administrative judge merely cited to the appellant's brief in identifying the grade and title of the GS-13 position at issue. See Initial Decision at 17.

Therefore, we find that the administrative judge properly concluded that the appellant failed to meet his burden of proving discrimination based on his handicapping condition.[6]

The Administrative Judge Did Not Order an Illusory Remedy.

The appellant contends that the administrative judge erred by prescribing an illusory remedy. He asserts that the remedy merely required the agency to consider him for

promotions and did not require good faith consideration or provide for sanctions in the event that the agency acted in bad faith in its consideration. He contends that the administrative judge should have ordered the agency to promote him because, otherwise, the agency was left with the discretion to determine the position to which the appellant should be restored and whether he should be promoted.

We find no merit to the appellant's contentions. Under 5 C.F.R. § 353.201(a) (1987), the agency is reguired only to "consider every employee absent because of compensable injury . . . for all promotions for which he could be considered were he not

absent." Implicit in this provision is the requirement that the agency act in good faith.

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[6] The appellant also contends that the administrative judge erred in stating that the Federal Circuit constructively restored him to his position from May 7, 1982, when his first period of compensation ceased, until the date of that court's judgment on February 1, 1985. Since we have already found herein that the appellant was entitled to be considered for promotions up to the time of his return to duty, we need not address this contention further.

If the appellant believes that the agency has failed to do so, he has the right to seek enforcement of the Board's order. The fact that the administrative judge did not specifically order the agency to promote the appellant does not render illusory the remedy which the

administrative judge ordered. Further, as we have noted, supra, there is no requirement under 5 C.F.R. Part 353 that the agency promote an employee who recovers within one year of a compensable injury. The only requirement is that the agency consider the employee for applicable promotions. Therefore, the appellant has not shown error here by the administrative judge.[7]

ORDER

The agency is ORDERED to consider the appellant, nationwide, for restoration to positions at the GS-13 grade level or higher for which he would have been considered had he been present from January 25, 1985, to the date he was permitted by the agency to return to

work, pursuant to the parties' settlement agreement. The agency must identify positions on a nationwide basis retroactive from January 25,

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[7] We also note the appellant's assertion that the agency improperly failed to grant him sick leave after the Federal Circuit reversed his disability retirement. See Appellant's Petition for Review at 6; Review File, Tab 3. In Barger v. Department of Justice, 11 M.S.P.R. 170, 176 (1982), we stated that the reasons for an agency's decision to deny leave are reviewable by the Board in an appeal from a disciplinary action which is within the Board's jurisdiction, and which is based on absence without leave (AWOL). Since the agency's alleged denial of sick leave in the instant case does not involve a disciplinary action based on AWOL, it is inappropriate for the Board to review it.

to the date the appellant returned to work. The agency must also determine whether the appellant was qualified for

those positions based on his recovery from his emotional illness. See Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). This action must be accomplished within 20 days of the date of this decision.

The agency is also ORDERED to issue a check to the appellant, if applicable, for the appropriate amount of back pay, interest on back pay, and other benefits in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date of this decision. The appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all

necessary information requested by the agency to help it comply.

The agency is further ORDERED to inform the appellant in writing of all actions taken to comply with the Board's order and the date on which it believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

If there is a dispute about the amount of back pay and/or interest due, the agency is ORDERED to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision. The appellant may then file a petition for enforcement with the regional office within 30 days of the agency's

notification of compliance to resolve the disputed amount. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and include the dates and results of any communications with the agency about compliance.

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
1801 L Street, N.W., Suite 5000
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days

after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See, 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if

you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the

Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board
Washington, D.C.

SEPARATE OPINION OF CHAIRMAN LEVINSON

I write separately to address in detail two issues raised by the agency in its petition for review.

I. The appellant's entitlement to benefits under 5 U.S.C. § 8151

Under the statute, the appellant is entitled to restoration rights, including the right to promotion, if the recurrence of his injury began after he "resume[d] regular full-time employment with the United States." 5 U.S.C. § 8151. The Department of Labor (OWCP) approved worker's compensation benefits for the appellant on the basis of a recurrence of his emotional injury, covering the period from January 25, 1985, to January 8, 1986. Nevertheless,

the agency argues that the appellant was not entitled to restoration rights because he had not resumed regular full-time employment before his disability recurred. The majority opinion does not specifically address this contention, but simply treats OWCP's decision of entitlement as dispositive.

As the Board noted in Denny v. Department of the Navy, MSPB Docket No. SF03538810389, slip op. at 8-9, (Jan. 19, 1990), neither 5 U.S.C. § 8151 nor its legislative history defines the term "regular full-time employment." Under the circumstances of this case, however, I believe that the appellant may be deemed to have "resumed regular

full-time employment" with the agency at the time of the recurrence of his injury by virtue of the Federal Circuit's order in Gavette v. Office of Personnel Management, 765 F.2d 158 (Fed. Cir. 1985) (table); No. 84-1282, slip op. at 11-12. See majority opinion, at 3. As the agency notes, the appellant had not actually returned to the performance of his duties prior to the January 1985 recurrence of his injury. But he was precluded from doing so by the agency, and that action was reversed by the court. By prevailing before the Federal Circuit and being awarded the attendant relief of appropriate back pay "and any other relief to which he is entitled in accordance with this opinion," the

appellant was entitled to be placed as nearly as possible in the status quo ante. See Kerr v. National Endowment for the Arts, 726 F.2d 730, 733 (Fed. Cir. 1984). Thus, I agree with the majority's conclusion that the appellant is entitled to benefits afforded under 5 U.S.C. § 8151.

III. Whether the agency was required to consider the appellant for competitive promotions pursuant to 5 U.S.C. § 8151(b)(1) and § 353.201(a).

While I concur with the result reached by the majority on this issue, the agency's argument that it should not be obliged to consider the appellant for competitive promotions as well as for those that would have been made under a

career ladder warrants additional discussion. The OPM regulation in effect during the relevant period, 5 C.F.R. § 353.201(a) (1987), was ambiguous.* In pertinent part, it required agencies to "consider every employee absent because of compensable injury or military duty for all promotions for which he would be considered were he not absent." (Emphasis added). This could be interpreted to refer only to ordinary progressions up a career ladder and the like. Since an employee would normally be considered for a competitive promotion only if he applied for it, the 'italicized words could arguably rule out competitive promotions, at least in

the absence of proof that the appellant would have applied.

On the other. hand, the regulation could mean, more broadly, that the agency has to identify all promotions made while the appellant was incapacitated, even if they are in wholly different lines of work, determine whether the appellant would have been qualified for them, and consider him for every one for which he qualifies. This would be a very substantial burden, particularly since it would have to be done nationwide under the Board's case law. See Withers Department of the Air Force, 28 M.S.P.R. 379, 385 (1985); Phillips v. Department of Transportation, 22 M.S.P.R. 223, 227

(1984).

OPM addressed this very consideration when it amended 5 C.F.R. Part 353 in 1988. In the supplemental

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* The current version of section 353.201(a) provides:

(a) Agency promotion plans must provide a mechanism by which employees who are absent because of compensable injury or military duty can be considered for promotion.

information accompanying the final regulations, OPM responded to an agency's criticism that it went "too far in giving employees absent because of military duty or compensable injury, the right to be considered automatically for all promotions," as follows:

> The agency pointed out that this places an enormous burden on the

> agency and rarely, if ever, results in a promotion for the employee. We have taken a closer look at this and agree with the agency. Accordingly, we have modified this section to require automatic promotion consideration only when an employee is in a career ladder, in an apprenticeship program, or when his or her position is reclassified at a higher grade. (Emphasis in original).

53 Fed. Reg. 857, 858 (1988). This modification was reflected in new FPM guidance putting a more restrictive gloss on the regulation. FPM CH. 353, Subch. 1-3c3) at 353-4 (Feb. 24, 1988).

From this sequence of events, I infer that OPM itself understood the regulation in effect when the appellant's injury recurred to require consideration for competitive promotions. Accord, Cobb v. Prokop, 557 F.Supp. 391 (D. Mass. 1983).

Accordingly, I join the majority in holding that the agency was obliged to do so.

_____
(Date)

_____
Daniel R. Levinson,
Chairman

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

Case No.:
88-CV-71021-DT
Hon. Avern Cohn

vs.

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

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Detroit, MI 48226
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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

NOW COMES Plaintiff, Charles E. Gavotte, by and through his attorneys,

ROY, SHECTER & VOCHT, P.C., and moves for Summary Judgment on the issue of liability for the reason that there is no disputed issue of material fact.

1. The specific material fact on which Plaintiff bases his motion is the refusal of the Defendants, in pursuit of a common employment policy, to fail to advise individuals absent on workers' disability compensation that they are eligible for promotion and that there are specific promotion possibilities available. Those individuals who are not advised of promotion possibilities or that they are eligible for promotion do not fill out interest cards which could say they want promotions, because they do not have a reason to do so.

Defendants have taken the position in this lawsuit that failure to fill out an interest card absolves them of liability for failure to advise of promotion eligibility and of specific promotion possibilities. Thus, Defendants have maintained they could not have discriminated against Plaintiff because of his handicap, because he failed to fill out interest cards. See Affidavit of Plaintiff, Charles Gavette and Exhibit A, Defendants' Response to Merit System Protection Board's Order.

2. Defendants, however, have discriminated on the basis of Plaintiff's handicap because those who are suffering from handicaps which result in workers' disability

compensation absences are treated differently from those who are present.

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[1] References to Defendants' position are based on the briefs filed in the case at bar.

All persons who are present receive notification of their eligibility for promotions and the availability of these promotions. Those absent because of workers' disability compensation do not.

3. Defendants attempt to defend against this discrimination by claiming that they did not have to notify Plaintiff because he was not immediately adjudicated eligible for workers' disability compensation. This distinction permits Defendants to evade the regulations concerning promotions

simply by contesting workers' compensation eligibility. Further, there is no regulation permitting non-notification of availability and promotion opportunities to persons who are handicapped. Even if there were such regulations, this would also be impermissible handicap discrimination.

4. Plaintiff further states that this court should retain jurisdiction over the original action for the reasons including the position maintained by Defendants in Exhibit A, which demonstrate a distortion of the ruling of the Merit System Protection Board decision and a continuing pattern of handicap discrimination.

WHEREFORE, Plaintiff prays this

Honorable Court grant its motion for summary judgment on the issue of liability for discrimination.

Respectfully submitted,

ROY, SHECTER & VOCHT, P.C.

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

Case No:
89-CV-71021-DT

vs.

Hon. Avern Cohn

SECRETARY OF THE UNITED STATES,
DEPARTMENT OF THE TREASURY
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Defendant.

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BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

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QUESTIONS PRESENTED

I. DEFENDANTS HAVE ADMITTED THEY DO NOT PROVIDE HANDICAPPED PERSONS ABSENT ON WORKER'S DISABILITY COMPENSATION WITH THE PROMOTION NOTIFICATION PROVIDED TO PERSONS WHO ARE NOT HANDICAPPED.

11. PLAINTIFF'S FAILURE TO FILE INTEREST CARDS FOR PROMOTIONS WHEN DEFENDANTS FAILED TO NOTIFY HID OF ELIGIBILITY OF PROMOTIONS DOES NOT ABSOLVE DEFENDANTS OF LIABILITY FOR HANDICAP DISCRIMINATION.

III. DEFENDANTS HAVE DISCRIMINATED AGAINST PLAINTIFF BECAUSE OP HIS HANDICAP AND ARE, THEREFORE, LIABLE WITHOUT PROVING DISPARATE TREATMENT.

STATEMENT OF FACTS

Plaintiff, Charles Gavette, an employee of Defendant, Internal Revenue Service (IRS), had been awarded workers' disability compensation for two distinct periods, August 3, 1979 to May 7, 1982 and January 25, 1985 to January 8, 1986. As a result of the Defendants' failure to comply with requirements to notify him of his re-employment rights, promotion rights, and other benefits, and to enable him to obtain those rights and benefits, pursuant to 5 USC Section 8151 and FPM 353, Gavette filed two EEOC complaints alleging handicap and age discrimination. When the EEOC canceled his claims, he filed this case.

When he recovered from the second

compensable illness, Plaintiff requested his re-employment rights. Exhibit B, Letter dated January 26, 1986. Defendant IRS denied Plaintiff's request, claiming Gavette was allegedly retired prior to the date of his illness and, therefore, not qualified for the immediate and unconditional re-employment rights of an employee who recovers from a compensable illness within one year.

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[1] However, an agency may not disqualify an applicant solely because of his retired status. See Raymond v Thompson v US Postal Service, MSPB decision DA 353.99002. Further, IRS' February 20, 1986 letter acknowledges Plaintiff was retired effective February 1, 1985, subsequent to the date of his illness.

Exhibit C. On September 16, 1987, the

U.S. Department of Labor awarded a total disability compensation award for the period of January 25, 1985 through January 8, 1986. Exhibit D. On October 13, 1987, Plaintiff again requested re-employment Exhibit E.

On March 11, 1988 Plaintiff filed an Administrative EEO Complaint, Agency No. 88-1082. The complaint concerned Defendant IRS' failure to inform Plaintiff of his reinstatement rights, Defendant's refusal to reinstate Plaintiff to make a final decision and give Plaintiff his appeal rights. Exhibit F.

By letter dated March 30, 1988, responding to Plaintiff's October 13, 1987 letter, Exhibit G, IRS denied

Plaintiff's re-employment request, claiming restoration rights of 5 USC 8151 did not apply,[2] because, the IRS claimed, the compensable conditions arose after his alleged retirement. Exhibit H.

The IRS', March 30, 1988 letter was inaccurate. Plaintiff's illness commenced January 25, 1985. Plaintiff was employed by Defendant IRS at least through February 1, 1985. Exhibit I. Plaintiff was, in fact, never voluntarily retired and the Court of Appeals reversed the earlier involuntary retirement. Exhibit J. See also June I, 1988 settlement of Civil Action 84-

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[2] The IRS' reasons were much different from their initial denial of

February 20, 1986. Nevertheless, in that February 20th letter, IRS acknowledged it had placed Plaintiff on disability retirement effective February 1, 1985, after the January 25, 1985 commencement of an illness the Department of Labor found was caused by his IRS employment.

4109-DT, which restored Plaintiff to work.

On April 20, 1988 Plaintiff appealed IRS' March 30, 1988 decision letter to MSPB. Exhibit K. Plaintiff followed the appeal rights as provided by that IRS decision letter.

On May 10, 1988, Plaintiff filed a second Administrative EEO Complaint, Agency No. 88-1099. Exhibit L. This was because, as a result of a Freedom of Information Act request, Plaintiff learned IRS had failed to inform and

consider him for promotion during the first year of his absence from work during his two separate work-related illnesses, commencing in 1978 and 1985.

On May 19, 1988, Defendant IRS declined to process the first EEO Complaint, No. 88-1082. IRS contended that, since it had denied Plaintiff's request for reinstatement on March 30, 1985, he was no longer an aggrieved individual.

On June 1, 1988, Plaintiff and Defendant settled Civil Action 84 CV-4109-DT, reversing the February 1, 1985 involuntary disability retirement and awarding Plaintiff back pay and other benefits. The settlement permitted Plaintiff Gavette to pursue

any rights he may have accrued under 5 USC 8151 and Federal Personnel Manual (FPM) 353, including employment discrimination claims. Exhibit M.

Defendant IRS, by letter dated June 14, 1988, Exhibit N, informed Plaintiff that it terminated the second EEO Complaint, No. 1099. IRS contended, as it does today, that the June 1, 1988 settlement of Civil Action 84 CV-4109-DT resolved Plaintiff's discrimination claims.3

Plaintiff then appealed the two EEO Complaints to the Equal Employment Opportunity Commission (EEOC) on June 21, 1988 and July 6, 1988. The EEOC denied each of the two Complaints on, respectively, August 30, 1988 and

September 1, 1988.

Plaintiff petitioned to EEOC for review on September 28, 1988. On March 4 and March 6, Plaintiff received by certified mail the EEOC final decisions which again supported the IRS' termination of processing those complaints. On April 3, 1989, Plaintiff timely appealed EEOC's final decisions.[4]

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[3] This is the subject of Defendant's pending Motion For Summary Judgment. Plaintiff has filed a separate answer demonstrating that Plaintiff discrimination claims are not foreclosed. It is significant that in neither of the agency denials did the EEOC suggest that the reason (or even a reason) for rejecting the claims was that Plaintiff had settled them.

[4] It is true that 29 CFR 1613.403 appears to provide a plaintiff the option to file a mixed case complaint with the agency or a mixed case appeal with MSPB, pursuant to 5 CFR 1201.151,

but not both. However, the agency is to advise the person (s)he may not initially file both and that whichever is filed first shall be considered an election to proceed in that forum. The agency did not inform Plaintiff as required. Secondly, Plaintiff has pursued his appeal rights in the two EEOC appeals and the MSPB appeal, just as had been explained to him in each decision letter. Further, case law has given Plaintiff both paths to pursue. See, e.g., McGovern v EEOC, 28 MSPB 689 (1985). Plaintiff specifically raised the promotion issue in his April 20, 1988 appeal to the MSPB and in the two EEOC cases. See also, Gavette letter of March 11, 1988 to the IRS.

For Plaintiff's illness commencing August 3, 1979, Defendant failed to comply with the requirements set forth in the Appendix. For example, Defendant failed to notify Plaintiff for promotions during the first year of his absence. Defendant also failed to notify Plaintiff of and to consider him

for immediate and unconditional employment rights or of priority re-employment rights.[5]

Regarding Plaintiff's illness commencing January 25, 1985, Defendant IRS failed to comply with all the requirements set forth in the Appendix. For example, Defendant again failed to notify Plaintiff of and to consider him for promotions during the first year of his absence. Defendant also failed to notify Plaintiff of and to consider him for immediate and unconditional employment rights, or of priority re-employment rights.

It is clear Defendant failed to comply with any and all of the requirements whatsoever at any time

during either of Plaintiff's cited illnesses. Defendants admit they have so failed, and admit a policy under which they did not do so, despite the regulatory mandate to the contrary.

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[5] Plaintiff could have been re-employed as early as May 7, 1982 after the first illness.

I. DEFENDANTS HAVE ADMITTED THEY DO NOT PROVIDE HANDICAPPED PERSONS ABSENT ON WORKERS' DISABILITY COMPENSATION WITH THE PROMOTION NOTIFICATION PROVIDED TO PERSONS WHO ARE NOT HANDICAPPED

The discovery deposition of Sharon Hays was taken March 7, 1990, as the person designated by the Defendants as the individual most knowledgeable about procedures involving persons on workers' disability compensation. In fact Ms. Hays is a personnel staffing specialist

for the IRS in special programs. These special programs include retirement, workers' disability compensation cases and priority consideration. She has the ultimate decision in determining an employee's eligibility for promotion. (Hays dep., pp. 3-4) Workers' disability compensation was Ms. Hays', program. (Hays dep., p. 65).

Hays testified that when an individual goes out on workers' disability compensation, she gives them no indication of what their rights are or of what their rights would be on returning to work. (Hays dep., p. 70). The only information she gives them relates to forms they have to submit for approval of their workers' disability

compensation (Hays dep., p. 71).

Accordingly, the IRS' policies are in violation of those rules which require that individuals out on workers' disability compensation be notified of their rights and be notified of promotional opportunities. (Appendix attached).

II. PLAINTIFF'S FAILURE TO FILE INTEREST CARDS FOR PROMOTIONS WHEN DEFENDANTS FAILED TO NOTIFY HIM OF ELIGIBILITY FOR PROMOTION OR OF THE AVAILABILITY FOR PROMOTIONS DOES NOT ABSOLVE DEFENDANTS OF LIABILITY FOR HANDICAP DISCRIMINATION.

The applicable statutory provision, 5 USC Section 8151, states in pertinent part:

"(a) In the event the individual renews employment with the Federal Government, the entire time during which the employee was receiving compensation

under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the

Office of Personnel Management --

(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after he date of commencement of compensation ... the right to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the right to tenure [and] promotion..."

The purpose of this provision is to put workers in the position they would have been in had they not been injured. Raicovich v United States Postal Service, 675 F2d 417 (1982).

In Metscpulos v United States

Postal Service, 33 MSPB 536, 539 (1987), the Board held it was the agency's burden to submit evidence regarding available positions (including competitive supervisory positions, if at issue), and any restrictive qualification requirements, in order to show that it has made all reasonable efforts to re-employ a recovered employee.[6] See also, Whitfield v United States Postal Service, 5 MSPB 239 (1981).

As for the earlier compensation award, this is covered by 5 CFR 353.307, which entitles an employee whose recovery takes longer than one year to priority consideration for restoration to the position, in view of an

application for reappointment made within 30 days after compensation ceases. The request requirement is waived, however, where the agency, as in the case at bar, fails to advise the employee "of his rights, obligations, and benefits relating to his government employment." 5 CFR 353.106).[7] Thompson v United States Postal Service, MSPB Decision DAO 353.9902 (1981).

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[6] Metsopulos was determined under Section 8151(b)(2) which is analogous to 8151(b)(1), the subject section at bar.

[7] Thus, for example, Plaintiff should have been reinstated at a higher level prior to the settlement agreement. In view of the fact that the IRS chose to give Plaintiff a lump sum award, taxable at the higher rate, in conjunction with the settlement agreement, had Plaintiff been reinstated

on a timely basis, he would not have lost half his salary to taxes. Of course, this is in addition to the harm Plaintiff suffered when he was denied reinstatement after his first period of compensable illness.

At the very least, Plaintiff can establish by non-speculative evidence that he would have been promoted, Boese v Department of the Air Force, 784 F2d 388, 390 (Fed. Cir. 1986), a requirement which the Boese case found that Plaintiff did not sustain, although that Judgment was made following a trial before the MSPB. Evidence that the individual is able to perform the duties of the higher-grade positions for which he seeks retroactive promotion is significant. Naekel v Department of Transportation, FAA, 850 F2d 682, 684 (Fed. Cir. 1988).

Although Naekel suggests that now Plaintiff may have to demonstrate he would have obtained the position, the application of Metsopulos and Whitfield, as well as Section 8151(b)(1), demonstrates that where the agency fails in its burden to provide Plaintiff with relevant information to permit him to proceed with promotion(s), Defendants have rendered it impossible for Plaintiff to seek that particular burden. "Each promotion made under this section is to be effected on the day it would be effected if the employee were present." FPM Subchapter 2-3-2(b).

Plaintiff never applied for promotion because Defendants failed to tell him he could apply, and did not

tell him the positions he could apply for. By violating the rules which require Defendants to advise Plaintiff of his rights, the Defendants themselves created the situation which prevented Plaintiff from obtaining the promotions, promotions for which Defendants themselves have acknowledged he is eligible.[8]

III. DEFENDANTS SAVE DISCRIMINATED AGAINST PLAINTIFF BECAUSE OF HIS HANDICAP AND ARE, LIABLE WITHOUT PROVING DISPARATE TREATMENT.

Defendants have argued in this lawsuit that the only discrimination which is actionable is that alleging disparate treatment. Clearly, this is not the law. If an individual is treated in a specific manner for reason

of that person's handicap, Schipani v Ford Motor Co, 102 Mich App 606; 302 NW2d 307 (1981), then that is handicap discrimination. Section 504 of the Rehabilitation Act of 1973, 29 USC, Section 791, prohibits discrimination "solely by reason of the handicap" of "otherwise qualified individuals". Such discrimination is actionable if the individual is classified in a certain way because of a handicap, or if individuals who are handicapped are all treated the same way. Rancour v Detroit Edison Co, 150 Mich App 276, 289; 388 NW2d 336 (1986).

In the case at bar, Defendants have admitted that their policy is not to communicate information concerning

promotions to individuals absent on workers' disability compensation. Since

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[8] It is clear that Plaintiff was qualified for at least Grade 13 positions. In 1971, 90.8% of his work was at Grade 13 or above. In 1979, he was on a qualified for GS-13 promotion roster. In October, 1989 he was declared eligible for a GS-13 promotion Exhibit 0. See also, Exhibit P.

by definition, those who are on workers' disability compensation are handicapped, see, e.g., Rancour, supra, at 290,[9] it is axiomatic that persons who are absent on workers' disability compensation are treated differently from others because of their handicap.[10]

It makes no difference that Plaintiff was not adjudicated absent on workers' disability compensation

immediately, for the reason that the policy of non-notification remained the same and has never been changed. Additionally, the workers' disability compensation award was made retroactive and, thus, effective as of the date of Gavette's initial absence. Further, if the Defendants specifically had determined not to send Plaintiff the notices because it had not yet been adjudicated whether he was on workers' disability compensation, Defendants took that risk. They now should not benefit from the risk that they lost. Defendants have further bootstrapped the fact that Plaintiff did not apply for any positions, because he didn't know that they were available, into a method of

avoiding compliance with the Merit System Protection decision. The Board's decision, as sent to this Court, was that Plaintiff should be treated as if

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[9] An individual with handicaps is "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities." 29 USC Section 706(8)(b).

[10] Indeed, the government may not favor one class of handicapped person over another. Aden v Health and Human Services, 780 F2d 64; 39 FEP Cases 1108 (D.C. 1985).

he had been employed. Defendants have construed that "as if he had been employed" to mean that he could get a promotion only if he had applied for one. However, what Defendants have failed to note is that they never told him about employment opportunities

because he had not been treated as if he was employed. There is, thus, a substantial reason for this court to continue to retain jurisdiction of this case, and to find that this particular policy is discriminatory and that it violates Plaintiff's right not to be discriminated against because of his handicap.

Further, Defendants argue that the particular regulation at issue in the case at bar was never construed as Plaintiff now argues. First of all, Defendants' argument begs the question. The regulation was changed to reflect the interpretation Defendants now argue. Had it been given that interpretation to begin with, there would have been no

reason to change it. Clearly, it was changed from that which Plaintiff contends it was. During the relevant period the old regulation controlled.

Secondly, and most importantly, there has been an adjudication that the regulation means precisely what the Plaintiff argues it means, and that was the decision of the Merit System Protection Board in the case at bar.

In Harrison v Marsh, 46 FEP Cases 971 (W.D. Mo, 1988), Plaintiff had a radical mastectomy which prevented her from performing continuous typing. The Court, noting that the official general policy of the United States is that "[t]he Federal Government shall become a model employee of the handicapped

individuals", 29 CFR Section 1613.703, held that a governmental agency had a high burden to meet when confronted with the need to accommodate a handicapped employee. 46 FEP Cases at 976. The Defendant Army's failure to adequately notify Plaintiff of her rights with regard to interviewing for a new position were held to have violated the Act. 46 PEP Cases at 977.

Indeed, in appropriate cases, a court can order a promotion as relief for a violation of discrimination. Locke v Kansas City Power & Light Co,[11] 600 F2d 359; 26 FEP Cases 1549 (8th Cir. 1981), reflecting that there is absolutely no justification for preventing handicapped persons from

being promoted.[12]

Defendants' sophistic arguments concerning their immunity from liability because Gavette did not file an interest card is analogous to the argument rejected in Bryne v Golden, 48 FEP

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[11] This was the relief ordered in Harrison v Marsh, supra. See also, Cook v United States, 36 FEP Cases 1260 (Colo, 1983) where a requirement that Plaintiff present a certificate that he was mentally restored to be eligible for an informal referral system was found discriminatory, in that it required him to no longer be handicapped to use the system. The remedy was to give him priority for a 700-hour trial appointment at the GS-7 level, without adversely affecting his present GS-4 grade.

[12] The employee must be qualified, which Defendants recognized in the case of Gavette by placing him on the position-eligible list.

Cases 313 (S.D. N.Y. 1988), where the

General Services Administration (GSA) claimed that Plaintiff could not bring a handicap discrimination case because he failed to exhaust administrative remedies in time. Plaintiff claimed the failure was caused by the government's misleading him. The court, rejecting Defendants' claim that Plaintiff cannot invoke estoppel against the government, relied on decisions from the Third, Fourth, Fifth, Ninth, Tenth, Eleventh and D.C. Courts,[13] to hold that Plaintiff's position prevailed. Thus, since in the case at bar Plaintiff did not file interest cards because Defendants never gave him the opportunity to do so, Defendants are now estopped from raising this defense,

caused by their own violation of law.

CONCLUSION

Accordingly, summary judgment on behalf of the Plaintiff on the issue of discrimination because of handicap is requested.

Respectfully submitted,

ROY SHECTER & VOCHT, P.C.

LYNN H. SHECTER (P24845)
Attorney for Plaintiff
877 S. Adams, Ste. 302
Birmingham, MI 48009
(313) 540-7660

Dated: September 26, 1990

[13] Only the 7th Circuit Court decided contra.

APPENDIX

The Federal Personnel Manual provisions in effect during the required time period provide:

"Agencies are required to safeguard the rights of employees who are absent because of compensable injury or military duty, whether the employees have been separated, furloughed or placed on leave of absence. To this end, agencies must take the actions specified in this subchapter, as appropriate, and maintain the records necessary to assure that the rights granted these employees by law and regulation are preserved."

FPM Subchapter 3-1

"When employees sustain a compensable injury .... the agency must tell them .... about .... restoration rights, how to exercise them, the time limit, and how, where, and when to appeal to obtain those rights. Employees going on leave must know exactly when to report for work after recovering from injury .... On things employees must decide for themselves, they should have all the information necessary to make a good decision, for decisions on what to do about rights under the life insurance and health benefit programs, right to be paid for annual leave or to permit it to

remain to their credit until returning, and the right to leave their retirement deductions or to take a refund.

FPM Appendix A-1(e)

"If any employee has recovered within one year after the date of compensation begins ... the employee is entitled to resume his or her former or an equivalent position."

FPM Subchapter 2-6(A(1)

"Note: The 1-year period referred to in this section means 1 year from the date compensation would ordinarily begin. For example, if the employee fully recovers, but the Department of Labor has still not determined if the claim is compensable, the agency should generally accord the employee the rights specified herein pending the Department's determination.

FPM Subchapter 2-6(a)(4)

"If an employee's recovery takes longer than one year from the date compensation begins, the last employing agency must make all reasonable efforts to place, and must accord priority to placing the employee in his or her former or an equivalent position ...."

FPM Subchapter 2-6(a)(3)

"Restoration right is agency wide. The responsibility for restoring an employee rests on the agency, not just the installation the employee left because of compensable injury or military duty. An employee must be restored if there is an appropriate position anywhere in the agency."

FPM Subchapter 4-2(b)

"An agency must consider absent employees for every promotion they would be considered for if they were present.[1]

FPM Subchapter 3-2(a)

"Each promotion made under this section, is to be effected on the day it would be effected if the employee were present."

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[1]/This did not happen. The agency did not notify Plaintiff of promotional opportunities. If he did not know, he couldn't apply. Having thus deprived him of the opportunity to apply, Defendants take the position that they are absolved of liability because Plaintiff never applied. Exhibit A, Defendants' Answers to Interrogatories. Additionally, had Plaintiff rightfully and timely been reemployed he would not

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have lost the opportunity to advance in his career.

FPM Subchapter 3-2(b)

The applicable statutory provision 5 USC A Section 8151, states in pertinent part:

"(a) in the event the individual renews employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based on length of service."

"(b) Under regulations issued by the Civil Service Commission.

> (11) The department or agency which was employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation the right to resume his former or an equivalent position as well as all other attendant rights which the

employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, [and] promotion ...." (emphasis added)

"(2) The department or agency which was the employer shall, if the injury or disability is overcome within a period of more than 1 year after the date of commencement of compensation, make all reasonable efforts to place, and accord priority to placing the employee in his former or equivalent position within such department or agency, or within any other department or agency."

Charles E. Gavette
SS# 374 32 5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

Item 7: I am appealing the following:

1. The March 30, 1988 Internal Revenue Service letter of decision denying me restoration rights for reemployment which I claim to be entitled to pursuant to 5 U. S. C. 8151(b)(1). See exhibit -A- March 30, 1988 IRS decision letter.

2. IRS failure to notify me of restoration/reemployment rights for an employee who is absent from duty because of a workers compensation claim, for the following workers' compensation claims I filed:

   a) Workers' compensation claim and award for the period August 3, 1979 through 7, 1982.
   b) Workers' compensation claim and award for the period January 25, 1985 through January 8, 1986.

3. IRS failure to notify me of promotional rights for an employee who is absent from duty because of

a workers' compensation claim, for each claim as stated in 2 above.

4. IRS failure to notify and inform me of the following as stated in Federal Personnel Chapter 353-A-1(e):

"Employees going on leave of absence must know exactly when to report for work after ... recovering ... On things employees must decide for themselves, they should have all the information necessary to make a good decision; for example, decisions on what to do about rights under the life insurance and health benefit programs, right to be paid for annual leave or to permit it to remain to their credit until their return, and the right to leave their retirement deductions or to take a refund.

"All of the above are covered 5 U. S. C. 8151 and FPW Chapter 353 Item 10A and 10B Grade and salary at time of action:

My grade and step on August 3, 1979 was grade 12, step 7. My salary on August 3, 1979 was 27,707.

My grade and step on January 25, 1985 was grade 12 step 9. My salary on January 25, 1985 was 40,051.

Items 15 and 16: Length of service with acting agency and Government.

IRS service, June 19, 1961 through January 31, 1985. Also imminent settlement of a discrimination law suit provides for my reinstatement retroactively to February 1, 1985 with back and return to duty.

U.S. military service, October 21, 1952 to September 1, 1956.

U.S. Postal Service, Christmas temporary help 1957, 1950 and 1959.

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

Item 21: Why do you think the agency was wrong in taking the action:

1. In regard to my workers' compensation claim and award for the period August 3, 1979 through 7, 1982:

   a) IRS has never given me a reason for not providing me with my rights as an employee who has filed a workers' compensation claim. The fact IRS has failed to comply with the requirement of an agency as provided for in FPM Chapter 353 is prima facie evidence IRS is wrong.

2. In regard to my workers' compensation claim and award for the period January 25, 1985 through January 8, 1986:

   a) IRS has never given me a reason for not providing me with my rights as an employee who has filed a workers' compensation claim. The fact IRS has failed to comply with the requirements of an agency as provided for in FPM Chapter 353 is prima Facie evidence

IRS is wrong.

b) By letter dated January 27, 1986 I notified IRS of my recovery from an illness and requested to be returned to duty immediately. I also requested - IRS timely advise me and/or counsel me of any and all reemployment rights I might possibly be entitled to and all Federal laws regulations. Nearly one month late IRS sent me a letter dated February 20, 1986 which states:

"As you have been previously advised, it is our position that as of February I, 1985, you are retired on disability

Clearly the IRS February 20, 1986 reply to January 27, 1986 request be immediately returned to duty did not consider my rights pursuant to 5 U.S.C. 8151 and FPM 353. Rather, it is clear IRS assumed since I was retired I had no right, pursuant to 5 U.S.C. 8151 and FPM 353.

In March 1988 I discovered through a Freedom of Information Act request that I had immediate restoration/employment rights as of January 9, 1986. That was pursuant to 5 U.S.C. 8151 and FPM 353,

since I had recovered from the illness within one year and IRS did not controvert my workers' compensation claim. FPM Chapter 353 Subchapter 2-6(4) states:

"note: The 1-year period referred to in this section means 1 year from the date compensation would ordinarily begin. For example if the employee fully recovers, but the apartment of labor has still not determined if the claim is compensable, the agency should generally accord the employee the rights specified herein pending the Department's determination. Agencies may make an exception to the policy if they are controverting an employee's claim.

Charles E. Gavette
SS# 374 32 5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

IRS letter of February 20, 1986 states:

> "... an agency may hire a disabled annuitant, prior to a finding by OPM that the individual is recovered. Such reemployment, however, is solely at the agency's election.

It is apparent IRS considered me retired effective February 1, 1985 and - therefore I did not have immediate and unconditional rights for restoration/reemployment following my recovery from an illness for which IRS had not controvered workers' compensation claim. Raymond O. Thompson v U.S. Postal Service, MSPB decision DAO 35399002 in considering an employee's reemployment rights pursuant to 5 U. S.C. 8151 and FPM Chapter 353 states:

> "An agency may not disqualify an applicant solely because of his retired statue."

For all of the above reasons IRS February 20, 1986 response to my letter of January 27, 1986 was wrong. See

Exhibit - B -, January 27, 1986 letter by Charles E. Gavette to IRS. See Exhibit - C - , January 20, 1986 letter by IRS to Charles E. Gavette.

c) By decision letter dated September 16, 1987 awarded a worker's compensation award for the period June 25, 1985 through; January 8, 1986. I assumed now that I had received a compensation award my rights for immediate and unconditional return to work were then effective and I should be notified by IRS to return to work. I did not hear from IRS so by letter dated October 13, 1987, hand delivered, I requested immediate and unconditional restoration/reemployment rights pursuant to 5 U.S.C. 8151. Over 5 months later IRS finally gave me a letter of decision dated March 30, 1988. IRS explained their procrastinacision and delay in reaching a decision was because extensive research and fact finding was necessary. FPM Chapter 353 appendix A-4(4) requires when an agency fails to restore an employee immediately the agency must immediately notify the employee in writing of the reasons and inform the employee of appeal rights. Obviously IRS failed to comply with that FPM provision initially and

continuously since January 1986 through March 30, 1988.

The IRS decision letter of March 30, 1988 provides weak and fabricated reasons for denying me rights claimed pursuant to 5 U.S.C. 8151 and FPM Chapter 353. IRS position that my illness commencing January 25, 1985 was long after my separation is wrong because the Court reversed my January 6, 1982 involuntary disability retirement. The Court further ordered I be paid back pay and other benefits. The other benefits awarded me by the Court include my right as an employee to file a workers' compensation claim and my rights claimed pursuant to 5 U.S.C. 8151 and FPM Chapter 353.

Charles E.Gavette
SS# 374-32-5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

IRS letter February 20 1986 acknowledges I was an employee through January 31, 1985. That letter states:

> "As you have been previously advised, it is our position that as of February 1, 1985, you are retired on disability."

IRS position that my illness incurred on January 25 1985 was not precipitated or aggravated by the IRS erroneous allegations my performance was deficient is both ludicrous and a moot issue. Whatever the cause of an employee's compensable injury or illness is all that is essential for immediate and unconditional restatement/reemployment rights pursuant to 5 U.S.C. 8151 and FPM Chapter 353, in event there has been full recovery within one year. As stated above in event an agency does not controvert a workers' compensation claim the immediate and unconditional rights for restoration are effective immediately at the date of full recovery, even though that may be prior to the final decision of the workers compensation claim.

For all of the above reasons IRS March 30, 1988 response to my October 13, 1987 letter is wrong. See Exhibit - D - October 13, 1987 letter by Charles E. Gavette to IRS.

Charles E. Gavette
SS# 374 32 5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

Item 22: What action would you like the Board to take on this case?

I am asking the board to take the following action:

1. Determine IRS engaged in wrongful and prohibited personnel practices including discrimination as result of the following:

   a) IRS failure to comply with the requirements of an agency as provided for pursuant to 5 U.S.C. 8151 and FPM Chapter 353.

   b) IRS refusal to inform and discuss with me the IRS understanding of the facts and law prior to issuance of the March 30, 1988 decision letter denying me restoration rights, pursuant to 5 U.S.C. 8151 and FPM Chapter 353.

2. Reinstate me, pursuant to authority of 5 U.S.C. 8151(b)(1), and FPM Chapter 353, effective February 1, 1985 with retroactive back pay and

other benefits, as authorized by the back pay act.

3. Award me retroactive promotions to grades 13, 14, and 15 at earliest dates legally possible, with back pay retroactive, as result of failure to notify me of promotional rights and opportunities during my absences from duty for periods August 3, 1979 through May 7, 1982 and January 25, 1985 through January 8, 1986, because of my workers' compensation claims for which I received compensation awards because of illnesses caused by IRS wrongful and discriminatory actions.

4. Award me any retroactive promotions, at earliest dates legally possible, not awarded under request per 3 above and any additional promotions legally permissible because of wrongfully and discriminately both failing to notify me of my right to return to work following my recovery of compensable illnesses and because of IRS refusal to permit me to return to work following my recovery from compensable illnesses.

5. Order IRS to comply with FPM Chapter 353-A-1(e). See attachment

page A-I, item 7, number 4.

6. Order IRS to accommodate my handicap by ordering IRS not to assign me to work under the supervision of Mr. Anthony Wycihowski.

7. Order IRS to provide any other remedies appropriate including training back pay with interest, and expenses/cost or attorney fees and other cost.

Charles E. Gavette
SS# 374 32 5900

ATTACHMENT TO MERIT SYSTEMS
PROTECTION BOARD APPEAL FORM

Item 23: If you believe you were discriminated against by the agency in connection with the matter appealed because of either your ... handicapping condition or age indicate so and explain why you believe it to be true. You must indicate by examples how you were discriminated against.

I was discriminated against based on my handicap and age as follows:

1. IRS completely failed to comply with the requirements of "telling employee of rights" as is required of an agency when an employee files a workers' compensation claim and is absent from duty. See FPM Chapter 353A-1(e).

2. Prior to IRS decision letter of March 30, 1988 IRS at no time discussed with me the facts as they contend them to be. IRS also did not discuss their interpretation of the law. Stated refusal by IRS discriminatorly denied me administrative due process to attempt to resolve the issues at the agency level based on

meaningful exchange and discussion of the facts and law. It is with those discriminatory circumstances I am forced to either yield to IRS intimidation and retaliation or to make this appeal. See - E - my April 6, 1988 response to IRS March 30, 1988 decision letter.

3. The reasons in IRS decision letter of March 30, 1988 are conclusory without any supportive evidence of facts or law whatsoever.

4. I contend IRS has intentionally refused to comply with FPM Chapter 353 A-4-4 in an effort to force a more favorable settlement of a discrimination law suit in U.S. District Court in which I am plaintiff and IRS is defendant. For same reason IRS has denied me administrative due process as stated in 2 above.

5. IRS decision and failure to comply with proper notification to me is also based on discrimination and retaliation because of my filing two grievances in 1979, my successfully obtaining Court reversal of the January 6, 1982 involuntary disability retirement. Similarly because of my successful law suit obtaining an award for attorney fees and cost.

DEPARTMENT OF THE
INDIVIDUAL COMPLAINT OF EMPLOYMENT
DISCRIMINATION

Based on
Race, Color, Religion, Sex, National
Origin, Age, Physical or Mental Handicap
or Retaliation

FOR OFFICE USE ONLY
PLEASE TYPE OR PRINT
COMPLAINT NO.

PLEASE NOTE: INFORMAL PRE-COMPLAINT EEO COUNSELING IS A REQUIREMENT AND NO FORMAL COMPLAINT CAN BE ACCEPTED FOR INVESTIGATION WITHOUT IT.

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1. Charles E. Gavette
6816 Blue Grass
Clarkton, Mich. 48016

Home Phone: Area Code 313 625-2854

Give area code and number where you can be reached during normal business hours if different from those above.

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3. Are you working for the Federal

Government? Yes __ No X See comment reverse of this form

What was the date of the last alleged The Discriminatory/retaliatory event is ongoing

7. What was the date of your last interview wit the EEO? I last spoke with EEC Counselor M. DellaMara, by phone 5/3/88 Address: 229 Fed. Bldg. , Lansing MI 48992. 517-377-1810

Check only the basis or bases on which you think you were discriminated against. Put information in the space provided only for the category or categories in which you are alleging discrimination. If alleging age discrimination, give date of birth. (To file a complaint based on age, you must have been at least 40 years old when the matter of concern occurred.) If alleging handicap discrimination, you must offer evidence of your specific impairment and whether and how you are qualified for the position, training, etc. sought.

X AGE
__ SEX _____ __ COLOR: _____

DATE OF BIRTH 9-17-32

__ SEX HARASSMENT _____

HANDICAP:

X MENTAL
__ RELIGION _____ __ RACE _____

__ RETALIATION/REPRISAL

FOR INVOLVEMENT IN

COMPLAINTS PROCESSED

PHYSICAL
mental and physical handicaps are the result of IRS's record of having erroneously perceived me to be handicapped, based on psychiatric reasons. The harassment and stress caused me by IRS resulted in emotional illness and physical illness high blood pressure (hypertension), etc.
qualify for the position sought because the Labor Dept. determined
I fully covered within one year. See 5 USC 8151(b)(1) and FPM 353 provisions. February 1, 1985 United States Court of Appeals For The Federal District Court.

10. State your complaint. Use extra sheets if necessary. Identify the specific acts, incidents or events which you believe were discriminatory or in retaliation against you. Show the dates on which these acts, incidents or events

occurred. If you are alleging discrimination against, e.g. failure to modify work site, failure to offer opportunity for training or advancement. If you are handicapped and your complaint is concerned with specific job, training, etc. you should offer evidence that you were qualified for the position, training, etc. which you sought. If handicapped, you should also request the reasonable accommodation you prefer appropriate.

See attachment pages A-1 and A-2 for item 10.

SPECIAL COMMENT REGARDING EARLIER COMPLAINT OF MARCH 11, 198:

This complaint is an expansion of an earlier formal complaint filed March 11, 1988. The cause for this complaint results from information received under the Freedom of Information Act subsequent to the EEO counselors meeting with me. The information received brought to my attention a much larger scope of discrimination against me by my employing agency, IRS.

Accordingly Equal Employment Opportunity Commission or others concerned may want to associate this complaint with the March 11, 1988 complaint. Decision to file this complaint was the result of the following:

1. My letter dated March 11, 1988 to Dorthy Drake EEO Coordinator IRS, Detroit, Mich. P.O. Box 33050, Stop 47. See Exhibit "A".

2. Dorthy Drakes March 31, 1988 response to my March 11, 1988 letter, See exhibit "B".

Item 8:
On April 20, 1988 I appealed the IRS's March 30, 1988 decision not to reinstate me pursuant to 5 USC 8151 and FPM Chapter 353. That refusal now in the initial stage was filed with Merit

Systems Protection Board, Federal Building, 230 South Dearborn Street, 31st Floor, Chicago, Illinois 60604.

Item 9: Settlement of discrimination law suit seems imminent. Settlement will include my being reinstated as an employee of IRS effective retroactive to February 1, 1985, with back pay and other benefits WSPB Docket Number CHO3538810382

11. State the remedial or corrective action you are seeking to resolve your complaint.

See attachment page A-3

12. You must sign and date this complaint.

ATTACHMENT TO:
INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION

Statement of complaint, acts, incidents, events of which IRS discriminated and retaliated against me:

1. IRS failure to notify me of restoration/reemployment rights for an employee who is absent from duty because of a workers' compensation claim, for the following workers' compensation claims I filed:

2. a) Workers' compensation claim and award for the period August 3, 1979 through May 7, 1982.

b) Workers' compensation claim and award for the period January 25, 1985 through January 8, 1986.

2. IRS failure to notify me of promotional rights for an employee who is absent from duty because of a workers' compensation claim, for each claim as stated in 2 above.

3. IRS failure to notify and inform me of the following as stated in Federal Personnel Manual Chapter 353-A-1(e):

"Employees going on leave of absence must know exactly when to report for work after ... recovering ... On things employees must decide for themselves, they should have all the information necessary to make a good decision: for example, decisions on what to do about rights under the life insurance and health benefit programs right to be paid for annual leave or to permit it to remain to their credit until their return, and the right to leave their retirement deductions or to take a refund.

4. IRS failed to comply with the requirements of FPW 353 Appendix A 4-4 because:

   a) IRS decision not to grant me reinstatement/restoration rights was excessively delayed in an effort to influence settlement negotiations of a discrimination law suit I have against IRS.

   b) IRS written notification denying me reinstatement/resoration rights does not provide adequate reason of facts or law.

5. IRS denies me adminisstrative due process at the agency level by refusing to discuss any fact or law, as they contend them to be.

6. IRS decision not to reinstate me and failure to comply with proper notification to me is also based on discrimination and retaliation because of my filing two grievances in 1979, my success fully obtaining Court reversal of the January 6, 1982 involuntary disability retirement. Similarly because of my successful law suit obtaining an award for attorney fees and cost. Same is true because of a discrimination law suit in U.S. District Court in which I am plaint and IRS is defendant.

ATTACHMENT TO:

INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION

Statement of manner in which I contend I have been discriminated against as resuslt of IRS perception I am handicapped:

IRS has a record of erroneously perceiving me as having a mental handicap. IRS action erroneously caused OPM to grant IRS application for my involuntary disability retirement, alledgedly based on physhiatric illness or handicap. That involuntary disability retirement was reversed by U.S. Appeals Court for the Federal District, in a February 1, 1985 decision.

The above state action and harassment resulted in my being awarded two workers' compensation claims for emotional illness.

IRS rather than accommodate my perceived handicap, by way of transferring me away from a discriminating supervisor, pursued efforts to place me on involuntary disability retirement. IRS now refused to comply with my rights

pursuant to 4 USC 8151(b)(1); immediate and unconditional restoration to duty following my recovery from a compensable illness within one year.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

vs.

Case No.:
89-CV-71021-DT
Hon. Avern Cohn

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER & VOCHT, P.C.
BY: LYNN H. SHECTER, (24845)
877 S. Adams, Ste. 302
Birmingham, MI 48009
(313) 540-7660

STIPULATION FOR COMPROMISE SETTLEMENT

IT IS HEREBY STIPULATED between Plaintiff CHARLES E. GAVETTE, (Hereinafter "MR. GAVETTE") and Defendant SECRETARY OF THE UNITED STATES DEPARTMENT OF TREASURY (Hereinafter

"SECRETARY") as follows:

1. The parties do hereby agree to settle and compromise the above-entitled action upon the terms indicated below.

2. The SECRETARY will cancel or cause to be canceled the disability retirement which was effective February 1, 1985 and will reinstate MR. GAVETTE as a grade 12 Revenue Agent in Pontiac, Michigan, as if he had remained on active duty. The appropriate within grade increase to Step 10 of that position will be credited effective on or about January 31, 1988. MR. GAVETTE will be paid back pay from February 1, 1985 to the effective date he is permitted to return to work, subtracting disability retirement pay, worker's

compensation benefits, and any earnings received from other employment in the interval, as well as all other appropriate deductions from pay and other computations, pursuant to 5 C.F.R. part 550, Subpart H-Back Pay. Sick leave will be credited as appropriate to MR. GAVETTE'S account for the period February 1, 1985 to the date MR. GAVETTE is permitted to return to duty, pursuant to 5 C.F.R. Part 550, Subpart H-Back Pay. Annual leave for the period February 1, 1985 to the date MR. GAVETTE is permitted to return to duty will be credited an appropriate to MR. GAVETTE'S account together with the annual leave for which MR. GAVETTE received a lump-sum payment after the Federal Circuit

decision on February 1, 1985 in Gavette v. Office of Personnel Management, Department of Treasury, (Fed Cir. Appeal No. 84-1286). One of the deductions from MR. GAVETTE'S back pay is the lump-sum (leave) payment in return for recrediting of MR. GAVETTE's annual leave account pursuant to 5 C.F.R. Part 550, Subpart H - Back Pay. The Internal Revenue Service (hereinafter "IRS") agrees to permit MR. GAVETTE the option to buy back any leave permitted by law, including leave used in lieu of workers' compensation benefits.

3. It is agreed that Pontiac, Michigan will be MR. GAVETTE'S assigned post of duty. It is understood, however, that MR. GAVETTE will receive

the same classroom and other training as is given to individuals new to the position of Revenue Agent. Such retraining for him may be held at his assigned post of duty (Pontiac), at Detroit IRS offices or at other offices of IRS. Throughout the retraining phases, MR. GAVETTE will be given work assignments commensurate with the amount of retraining he has received taking into consideration his lengthy absence but also his past experience. On the one hand, cases assigned to MR. GAVETTE should not be beyond his perceived present capabilities with more complex cases assigned only after any necessary retraining has been provided. On the other hand, he should be expected to

perform at a level for which his prior experience and training have prepared him with more flexibility as to the order of retraining classes and the amount of non-classroom retraining needed. It is expected that he will be able to handle complex cases much more quickly than a new Revenue Agent. However, IRS also recognized that MR. GAVETTE will need to receive retraining before he is expected to perform work commensurate with his grade level. It is understood that IRS has the right and duty to supervise MR. GAVETTE'S work and retaining with broad discretion according to IRS needs and MR. GAVETTE'S performance. It is further understood that MR. GAVETTE shall be reimbursed in

accordance with the established rules and regulations for all appropriate travel expenses incurred in connection with any (re)training courses conducted at places other than his assigned place of duty, Pontiac, Michigan.

4. MR. GAVETTE agrees to accept such cancellation of disability retirement, reinstatement, back pay, leave restoration rights, plus leave buy back rights permitted by law, retraining, and provision of paragraphs 5 and 7 herein in full settlement of any and all claims and demands which he or his heirs, executors, and administrators or assigns may have against the SECRETARY, IRS, the Office of Personnel Management, the Merit Systems Protection

Board and the United States of America, or their agents or employees on account of the incidents or circumstances giving rise to this suit except as hereinafter provided in paragraph 8.

5. The SECRETARY states that the group to which MR. GAVETTE is assigned in Pontiac, Michigan is not under the supervision of Mr. Anthony Wycihowski. It is the intent of IRS, to the extent practicable, not to place MR. GAVETTE under the immediate supervision of Mr. Wycihowski. Based on unforeseen circumstances, if Mr. GAVETTE should ever be placed under the immediate supervision of Mr. Wycihowski or assigned to a branch of which Mr. Wycihowski is the branch chief, MR.

GAVETTE will be given all due consideration should he request reassignment at that time.

6. In exchange for the promise herein of the SECRETARY to grant MR. GAVETTE's cancellation of the disability retirement, reinstatement, back pay, leave restoration rights, plus leave buy back rights permitted by law, retraining and all other provisions set forth herein, MR. GAVETTE shall stipulate to dismissal of the above-entitled action with prejudice, each party to bear it own costs, expenses, and attorney fees.

7. Upon reinstatement, MR. GAVETTE shall be permitted to request or apply for positions in other posts of duty as any other IRS employee.

8. This Agreement shall not constitute an admission of liability or fault on part of the SECRETARY, IRS, the Office of Personnel Management, the Merit Systems Protection Board and the United States of america or their agents or employees. The SECRETARY understands that MR. GAVETTE reserves any and all rights which may accrue or have accrued to him as a federal employee under the United States Department of Labor, Employment Standards Administration, Office of Worker's Compensation Progress (OWCP) as well as pursuant to 4 U.S.C. 8151 and Federal Personnel Manual Chapter 353, including any right of Equal Employment Discrimination Complaints with respect to alleged IRS

violation of any and all rights pursuant to 5 U.S.V. 8151 and Federal Personnel Manual Chapter 353.

ROY C. HAYES
United States Attorney

FRANCIS L. ZEBOT (P22700)
Assistant United States Attorney
817 Federal Building
Detroit, Michigan 48226
(313) 237-4779

CHARLES E. GAVETTE
Plaintiff
6816 Blue Grass
Clarkston, Michigan 48016
(313) 625-2854

Personnel Branch
STOP 5

QUALIFICATION NOTIFICATION FOR
ANNOUNCEMENT

IRS

YOU ARE ELIGIBLE AT GRADE: 13 POD: PO

If you have any questions, please
contact your manager.

Gavette, Charles
E:5:1504

STOP 939

ATTACHMENT TO:
INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION

Item 11:
State the remedial or corrective action you are seeking to resolve your complaint:

1. A determination IRS engaged in wrongful and prohibited personnel practices including discrimination as result of the following:

   a) IRS failure to comply with the requirements of an agency as provided for pursuant to 5 USC 8151 and FPM Chapter 353.

   b) IRS refusal to inform and discuss with me the IRS understanding of the facts and law prior to issuance of the March 30, 1988 decision letter denying me restoration rights, pursuant to 5 USC 8151 and FPM Chapter 353.

2. Reinstate me, pursuant to authority of 5 USC 8151(b)(1) and FPM Chapter 353, effective February 1, 1985 with retroactive back pay and other benefits as authorized by the back pay act.

3. Award me retroactive promotions to grades 13, 14, and 15 at earliest dates legally possible, with back pay retroactive, as result of IRS failure to notify me of promotional rights and opportunities during my absences from duty for periods August 3, 1979 through May 7, 1982 and January 25, 1985 through January 8, 1986, because of my workers' compensation claims for which I received compensation awards because of illnesses caused by IRS wrongful and discriminatory actions.

4. Award me any retroactive promotions, at earliest dates legally possible, not awarded under my request per 3 above and any additional promotions, beyond grade 15, legally permissible because of IRS wrongfully and discriminately both failing to notify me of my right to return to work following my recovery of compensable illnesses and because of IRS refusal to permit me to return to work following my recovery from compensable illnesses.

5. Order IRS to comply with FPM 353 -A-1(e). See attachment page A-I, item 7, number 4.

6. Order IRS to accommodate my handicap by ordering IRS not assign me to work under the supervision of Dr. Anthony Wycihowski.

7. Order IRS to provide any other remedies appropriate including training, back pay with interest, other benefits, attorney fees and cost.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

Case No.:
89-CV-71021-DT
Hon. Avern Cohn

vs.

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER & VOCHT, P.C.
BY: LYNN H. SHECTER, (24845)
877 S. Adams, Ste. 302
Birmingham, MI 48009
(313) 540-7660

AFFIDAVIT OF CHARLES GAVETTE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

CHARLES GAVETTE, being duly sworn, deposes and says:

1. I make these statements of my own personal knowledge, and if sworn as

a witness, I am competent to testify to the truth herein.

2. During any periods in which I was off on a workers' compensation related condition, I was never notified by Defendants of my eligibility for promotion or of any availabilities for promotion.

3. I had previously filed interest cards when I learned of promotion opportunities, and I would have continued to do so.

4. My only reason for not filing interest cards while I was off on workers' compensation was the Defendants' failure to notify me of right to promotion and to positions which became available.

FURTHER DEPONENT SAYS NOT.

_____

CHARLES E. GAVETTE

UNITED STATES DISTRICT COURT
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Hon. Avern Cohn

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PLAINTIFF'S ANSWER TO DEFENDANT'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

Plaintiff respectfully refers this Honorable Court to the Statement of Facts in Plaintiff's Motion For Summary Judgment and in Plaintiff's Answers to Defendant's Motion For Summary Judgment.

Defendant's last salvo in its paper war avoids the obvious.

This Honorable Court has jurisdiction of the case at bar under three approaches:

(a) as a discrimination action;

(b) as a mixed case, pursuant to Williams v. Dept. of the Army; 715 F2d 1485 (Fed Cir. 1983);

(c) as a discrimination action because no adverse action was taken.

In a mixed case, an employee may file his discrimination action with the Federal District Court under 5 USC Sec. 7702 (e) (1), if the Merit System Protection Board (MSPB) takes more than 120 days to decide an appeal. This

happened in the case at bar.[1] Cases involving discrimination claims may also be filed directly to the United States District Court within 30 days of final agency action, which is what GAVETTE did at bar. Pursuant to Senate Report No. 969, 95th Cong. 2d Sess., reprinted in (1978) U.S. Code Cong. & Ad. News 2775,2785, this was because:

"District Court is a more appropriate place than the Court of Appeals for these cases, since they may involve additional fact-finding. Furthermore, discrimination complaints involving employees outside the

---

[1]Althcugh Gavette filed this action within the 30 day period following the adverse action by the agency and after exhausting his administrative remedies, it appears that he would have been properly before this court on the basis of the excess of 120 days having run as well.

Federal government are now considered by U.S. District Courts. To encourage uniform judicial decisions in this area, both kinds of cases should continue to be considered by the U.S. District Court. The Section, therefore, exempts from the general requirement that employees appeal to the Court of Appeals or Court of Claims, those suits brought pursuant to the anti-discrimination laws."

In Williams v Dept. of the Army, 715 F2d 1485,36 FEP Cases 1518 (Fed. Cir. 1983), the Federal Circuit determined that bifurcation of an appeal from an MSPB decision in a mixed case was not permitted, and, rejecting dual review, held that appropriate jurisdiction was in the District Court pursuant to the statutory scheme. The court transferred the appeal to the District Court. 36 FEP Cases at 1522.

Defendants do not contend that the

discrimination portion of this lawsuit is properly before this court, GAVETTE filed with the EEOC, and, following cancellation of the discrimination claim, filed in this court. This is an action de novo, e.g. Rosenfeld v Dept. of Army, 769 F2d 237 38FEP cases 1150 (4th Circuit, 1985). This is appropriate, whether the final agency action consists of resolution of the mixed case by the Board or rejection of the claim by the agency. See S.Rep. No 969, 95th Cong., 2d Sess. 63 reprinted in 1978, U.S. Code Cong. & Ad. News 2723,2785. As an employee always has the right to de novo judicial review of discrimination in a District Court, Moore v. Devine, 780 F2d 1559 (11th

Circuit, 1986), GAVETTE is properly before this court. Most significantly, an appeal was not taken from the MSPB because it appears that the case does not satisfy the statutory scheme. The Defendants' petition before the this court establishes that there was no adverse action taken against GAVETTE, but that their actions were taken pursuant to a discriminatory policy. Thus, there was nothing to appeal, and GAVETTE is properly before this court because the application of a discriminatory policy deprived him of promotion.

That is because GAVETTE claims the failure to promote or to reinstate in a timely manner derived form a

discriminatory policy which Defendants do not deny. See, Plaintiff's Motion For Summary Judgment. As such, this is not an adverse action as construed under USo 7701. The case at baar, as developed by discovery, and admitted by

---

[2]The Defendants admit that they do not send out notices of reinstatement rights or of available promotions to persons as a class who are handicapped and on Workers Disability Compensation. If this Honorable Court determines that this is a discriminatory policy, then Gavette will be entitled to remedies, including promotion positions for which he would have been eligible had he received those notification rights. Defendants have contended that because Gavette never filled out the interest card, which an employee fills out when notified of the available positions, that they, therefore, were justified in the failure to promote him. Thus, Defendants have presented a defense which is a classic Catch-22, i.e., since we didn't notify you of the positions,

you didn't fill out the interest cards, and, therefore, if you didn't fill out the interest cards, we didn't have to promote you.

and admitted by Defendants, does not constitute an adverse action. Indeed, the agency claims that it has met the requirement of providing Plaintiff with consideration for promotion equivalent to that given employees who are not compensably absent from work. Thus, as there was no adverse action, there was nothing to appeal to the MSPB. The Defendants have used the failure to give notice as the basis for justifying the denial of the right for promotion. Their own actions thus demonstrate the need to require notice. This notice requirement is a part of the case at bar

before this Honorable Court. It is part and parcel of the claim for discrimination.

That part of the Defendant's Supplemental Motion directed to dismissal of the Age and Handicap Discrimination claims, misconstrues the case at bar. Plaintiff is contesting a discriminatory policy applied to a particular class, that is, a class of handicapped persons who are not considered for promotion opportunities and who are not notified of promotional opportunities. The failure to notify is the mechanism by which the Defendants subvert the statutory requirement that they be considered for promotion. This discriminatory policy does not require

individual disparate treatment. See Plaintiff's pending Motion for Summary Judgment.

Defendants maintain "the agency utilizes published promotion procedures to determine the extent to which Claimant should receive consideration for promotion." Defendants' Supplemental Brief p. 7. These published promotion procedures are discriminatory. Thus, Plaintiff has clearly and properly articulated a discrimination cause of action and one which should proceed in this Honorable Court.

Respectfully submitted,
ROY, SHECTER & VOCHT, P.C.

By:_____
WILLIAM A. ROY
DATED: October 8, 1990

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE,

Plaintiff,

Case No.:
89-CV-71021-DT
Hon. Avern Cohn

vs.

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER & VOCHT, P.C.
BY: LYNN H. SHECTER, (24845)
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PLAINTIFF'S ANSWER TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Plaintiff, CHARLES GAVETTE, by and through his attorneys, ROY, SHECTER AND VOCHT, P.C., and for his Answer to Defendants' Motion For

Summary Judgment, states as follows:

1. Plaintiff agrees that this Court should hold in abeyance these proceedings pending decision of the Merit System Protecting Board (MSPB). Plaintiff had previously advised Defendants that he would so stipulate.

2. Plaintiff timely field this action. See Exhibit A, Plaintiff's Answers to Defendants' Interrogatories, Exhibit B, certified mail setting forth date of receipt of EEOC rights to sue letters. Defendants offer no evidence other than their bare allegations to refute this.

3. Defendants have already determined that Plaintiff is qualified for promotion to a Grade 13 position.

Exhibit C.

4. It is undisputed that the law provides that as a result of Plaintiff's worker's disability compensation award, he is eligible for promotions. The dispute appears to be whether that provisions apply when there is no support for Defendant's position that it does not.

5. Appropriate analysis of the precedent on which Defendants rely reflect its inapplicability to the case at bar.

WHEREFORE, Plaintiff prays that this Honorable Court deny Defendants' Motion For Summary Judgment, and award Plaintiff his costs and attorney fees so wrongfully sustained in opposing this

Motion.

Respectfully submitted,

ROY, SHECTER & VOCHT, P.C.

By: _____
LYNN H. SHECTER

DATED: March 6, 1990

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TABLE OF AUTHORITIES

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Christo v. Merit System Protection Board, 667 F.2d 882 (10th Cir. 1981). . . . . .

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Synan v. Merit System Protection Board, 765 F. 2d 1099 (Fed. Circ. 1986). .

Tolliver v. DeNiro, 290 F. 2d 394 (9th Cir. 1986). . . . . .

Wall v. United States, 871 F. 2d 1540 (10th Circ. 1929). . . . . .

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BRIEF IN SUPPORT OF PLAINTIFF'S ANSWER TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATEMENT OF FACTS

Plaintiff, Charles Gavette, an employee of Defendant Internal Revenue Service (IRS), had been awarded worker's disability compensation for two distinct periods of time, August 3, 1879 to May 7, 1982, and January 25, 1985 to January 8, 1986. As a result of the Defendants' failure to comply with requirements to notify him of his reemployment rights, promotion rights, and other benefits, and to enable him to obtain those rights and benefits, pursuant to 5 USC Section 8151 and FPM 353, Gavette filed two EEOC complaints alleging handicap discrimination. When the EEOC canceled

his claims, he filed the instant action.

When he recovered from the second compensable illness, Plaintiff requested his reemployment rights. Exhibit D, Letter dated January 26, 1986. Defendant IRS denied Plaintiff's request claiming Gavette was allegedly retired prior to the date of his illness, and therefore not qualified for immediate and unconditional reemployment rights of an employee who recovers from a compensable illness within one year.[1] Exhibit E. On September 16, 1987 the U.S. Department of Labor awarded a total disability compensation award for the period of January 25, 1985 through January 8, 1986. See Exhibit G of Defendants' Brief. On October 13, 1987

Plaintiff again requested reemployment. Exhibit H of Defendants' Brief.

On March 11, 1988 Plaintiff filed Administrative EEO Complaint, Agency No. 88-1082. The complaint concerned Defendant IRS' failure to inform Plaintiff of his reinstatement rights, Defendant's refusal to reinstate Plaintiff and its refusal to make a final decision and give Plaintiff his appeal rights. See Exhibit I of Defendants' Brief.

By letter dated March 30, 1988, responding to Plaintiff's October 13, 1987 letter, See Exhibit K of Defendants' Brief, IRS denied Plaintiff's re employment request,

[1]/However, an agency may not disqualify an applicant solely because of his retired status. See Raymond v. Thompson v. U.S. Postal Services, MSPB decision DA 353.99002. Further, IRS February 20, 1986 letter acknowledges Plaintiff was retired effective February 1, 1985, subsequent to the date of his illness.

claiming restoration rights of 5 USC 8151 did not apply[2], because, the IRS claimed, the compensable conditions arose after his alleged retirement. See Exhibit J of Defendants' Brief.

The IRS' March 30, 1988 letter was inaccurate. Plaintiff's illness commenced January 25, 1985. Plaintiff was employed by Defendant IRS at least through February 1, 1985. See Exhibit K of Defendants' Brief. Plaintiff was in fact never voluntarily retired, and the

Court of Appeals reversed the earlier involuntary retirement. See Exhibit D of Defendants' Brief. See also, June 1, 1988 settlement of Civil Action 84 CV-4109-DT, which restored Plaintiff to work.

On April 20, 1988 Plaintiff appealed IRS' March 30, 1988 decision letter to MSPB. See Exhibit K of Defendants Brief. Plaintiff followed the appeal rights as provided by that IRS decision letter.

On May 10, 1988, Plaintiff filed a second Administrative EEO complaint, Agency No 88-1099. See Exhibit K of Defendants' Brief. This was because, as a result of Plaintiff's Freedom of Information Act request, he learned IRS

[2]/The IRS reasons were much different from their initial denial of February 20, 1986. Nevertheless, in that February 20 letter, IRS acknowledged it had placed Plaintiff on disability retirement effective February 1, 1985, after the January 25, 1985 commencement of an illness the Department of bar found was caused by his IRS employment.

had failed to inform and consider him for promotion during the first year of his absence from work during his two separate work-related illnesses, commencing in 1979 and 1985.

On May 13, 1988, Defendant IRS declined to process the first EEO Complaint, No. 88-1082. IRS contended that, since it had denied Plaintiff's request for reinstatement on March 30, 1985, he was no longer an aggrieved individual.

On June 1, 1988[3], Plaintiff and Defendant settled Civil Action 84 CV-4109-DT, reversing the February 1, 1985, involuntary disability retirement, and awarding Plaintiff back pay, and other benefits. The settlement permitted Plaintiff Gavette to pursue any rights he may have accrued under 5 USC 8151 and Federal Personnel Manual (FPM) 353, including employment discrimination claims. See Attachment to Defendant's Brief, paragraph 8.

Defendant IRS, by letter dated June 14, 1988, Exhibit F, informed Plaintiff that it terminated the second EEO Complaint, No. 1099. IRS contended, as it does today, that the June 1, 1988 settlement of Civil Action 84 CV-4109-DT

resolved Plaintiff's discrimination claims.

3/Defendant calls this May 28, 1988.

Plaintiff then appealed the two EEO Complaints to the Equal Employment Opportunity Commission (EEOC) on June 21, 1988 and July 6, 1988. The EEOC denied each of the two Complaints on, respectively, August 30, 1988 and September 1, 1988.

Plaintiff petitioned to EEOC for review on September 28, 1988. On March 4 and March 6, Plaintiff received by certified mail, the EEOC final decisions, which again supported the IRS' termination of processing those complaints. On April 3, 1989, Plaintiff

timely appealed EEOC' s final decisions.[4]

For Plaintiff's illness commencing August 3, 1979, Defendant failed to comply with the requirements set forth in the Appendix. For example, Defendant failed to notify Plaintiff of and to

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4/It is true that 29 CFR 1613.403 provides a plaintiff the option to file a mixed case complaint with the agency or a mixed case appeal with MSPB, pursuant to 5 CFR 1201.151, but not both. However, the agency is to advise the person (s)he may not initially file both and that whichever is filed first shall be considered an election to proceed in that forum. The agency did not inform Plaintiff as required. Secondly, Plaintiff has pursued his appeal rights in the two EEOC appeals and the MSPB appeal, just as had been explained to him in each decision letter. Further, case law has given Plaintiff both paths to pursue. See, e.g., McGovern v EEOC, 28 MSPB 689 (1985), infra.

consider him for of his immediate and unconditional employment rights or of his priority reemployment rights.[5]

Regarding Plaintiff's illness commencing January 25, 1985, Defendant IRS failed to comply with all the requirements set forth in the Appendix. For example, Defendant again, failed to notify Plaintiff of, and to consider his for promotions during the first year of his absence. Defendant also failed to notify Plaintiff of and to consider him for his immediate and unconditional employment rights, or of his priority re employment rights.

It is clear Defendant failed to comply with any and all of the requirements whatsoever at any time

during either of Plaintiff's cited illnesses. Plaintiff in his EEO Complaints alleged Defendants. IRS delay in providing a decision was caused by Defendant's attempt to reach a more favorable settlement in Civil Action 84 CV-4109-DT. It is clear on its face, however, that by reserving his rights under 5 USC Section 8151 and FPM 353, Plaintiff did not concede his claim for promotion in that agreement.

Precisely because Plaintiff was not given his right for promotion(s) during the first year of both of his illnesses

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5/Plaintiff could have been reemployed as early as May 7, 1982 after the first illness.

is why he seeks this remedy in this litigation. The Plaintiff's rights for

reemployment were not provided and as a result he has lost even further opportunity for promotion(s). That positions above GS-11 are filled competitively is irrelevant, as Plaintiff Gavette as never notified of the available positions during the periods of his being absent from work due to a compensable illness caused by his employer.

I. THIS LAWSUIT was FILED TIMELY.

For the reasons set forth in Plaintiff's Answer, this suit was timely filed. No matter what the dates on the right-to-suit letters, the certified mail reflects the dates of receipt of March 4 and March 6. Thus, this Court has subject matter jurisdiction.

II. PLAINTIFF IS PROPERLY BEFORE THIS COURT AS HE HAS EXHAUSTED HIS ADMINISTRATIVE REMEDIES.

An aggrieved party who does not receive a decision within 120 days of his or her filing with the Merit Systems Protection Board, may proceed in Federal District Court. Even the case on which Defendants rely, McGovern v.EEOC, 28 MSPB 689, 691 fn. 1 (1985) recognizes the section permits "an alternative and additional writ of appeal of . . . discrimination claims, simultaneous, but not necessarily superior, to . . . Board [MSPB] appeal." (emphasis added)

Plaintiff's rights to proceed under 5 USC Section 8151 were specifically reserved by the settlement agreement between the parties in Gavette v.

Secretary of U.S Department of Treasury, 84-CV-4109-DT. See, Attachment to Defendants' Brief.

III. PLAINTIFF HAS STATED A CLAIM ON WHICH RELIEF MAY BE GRANTED.

A. Plaintiff Requests Remedies in this Action That He Has Never Received.

Plaintiff filed two workers' compensation claims for which he was awarded compensation for the following two periods: August 3, 1979 through May 7, 1982, and January 25, 1985 through January 8, 1986. See, Exhibits A and E of Defendants' Brief. Plaintiff's reemployment rights for the two periods of compensable illness are covered by 5

USC 8151(b)(2) and 5 USC 8151(b) (1) respectively. In the case of the later illness Plaintiff's reemployment rights were immediate and unconditional because his recovery occurred in less than one year. With respect to the 1979 illness, Plaintiff's reemployment rights are controlled by the rules of priority consideration. Those rights, and all other rights Plaintiff has pursuant to 5 USC 8151 and FPM 353, were separate and apart from the settlement in Gavette v. Secretary of U.S. Department of Treasury, Civil Action 84-C-4109-DT. That lawsuit had challenged Gavette's February 1, 1985 involuntary disability retirement. Any rights to which Plaintiff is entitled as a result of the

two workers' compensation claims were not at issue in that former litigation. Accordingly, those rights were not resolved.

In fact, the parties specifically reserved those rights, in paragraph 8 of the June 1, 1988 Stipulation for Compromise Settlement. See, Attachment to Defendants' Brief.

The present action is brought pursuant to Plaintiff's rights provided for by 5 USC 8151 and FPM 353. Defendants clearly discriminated against Plaintiff by both not informing him of his rights and denying him those rights once he became aware and claimed them. He did not receive those rights and was not reemployed until the settlement in

84-CV-4109-DT. He, in fact, did not return to work until July 5, 1988. Had he received his promotional and reemployment rights when he was supposed to, he could have continued his career and received promotions for that entire period. Additionally, Plaintiff was automatically entitled to promotions during the first year because of an employment-related disability.[6]

As those rights were not part of the previous litigation, the amendments to 5 CFR Section 353, Restoration to Duty from Military Service or Compensable Injury, which Defendant IRS asks this Court to apply, were not effective until February 16, 1988. They do not apply to the issue at bar, as

they became effective after Plaintiff's cause of action arose. The Office of Personnel Management (OPM) in reviewing comments concerning the amendments, called it a "new proposal" and noted that all agencies responding "view it as a substantial improvement." 53 Fed. Register 857. Thus, OPM recognizes the amendments were a substantial change. There is no statement that the new regulations were to be retroactive. See also, MSPB Decision, 8/19/88. Exhibit M of Defendants' Brief. Accordingly, this Court should reject the offer to render the regulations retroactive. The previous rule, which was the

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[5]/Promotion rights are available to all persons absent because of a work-related

condition during their first year of absence. This interpretation is supported by logic and by the language of the Federal Personnel Manual (FPM). An employee who is out because of a compensable injury cannot know the duration of the absence. Thus, during the first year, (s)he is eligible automatically to be considered for promotion. Indeed, "[a]n agency must consider absent employees for every promotion they could he considered as if they are present." FPM Subchapter 3-2(a).

rule in effect during the pertinent period gave employees absent because of compensable injury, the right to be considered automatically for all promotions and the right to reemployment.

These are precisely the rights which were not given Plaintiff, and are remedies which he seeks through this

litigation. This relief has never been given him, and thus Plaintiff was not given his 5 USC Section 8151 rights. That positions above GS-11, not 12, are filled competitively is irrelevant, as Plaintiff Gavette was never notified of available positions during the two separate periods of his workers' disability compensation: He was further never notified of the need to seek reinstatement within 30 days of recovery from his compensable illness. Thus, because he never knew he had the right, he never waived it, and the Defendants cannot now claim he did not exercise his rights on time.

It is significant that as part of Plaintiff's EEOC claims, See,

Exhibits I and L of Defendants' Brief, he objected to Defendants' attempts to link his request to return to work following the conclusion of his work-related disability, to settlement of the previous case.[7] Defendants continue to attempt to tie together the settlement and compensation cases by their argument in today's Motion.

B. The Settlement Agreement in the Previous Action Does Not Involve the Action at Bar

The only connection the settlement agreement has with the present action is if the agency takes the position that Plaintiff's illness was not caused by his IRS employment,

and that therefore, he is not entitled to any rights provided for by 5 USC 8151 and FPM 353. This argument has no merit. However, basic to an award of workers' compensation is that the illness must be precipitated or aggravated by factors and conditions of employment. It is therefore, clear that when the Department of Labor ruled in Plaintiff's favor, the decision was made

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7/Not only did Defendants refuse to return Plaintiff to work, but the agency as well failed to comply with the following rights. Agency Action When Employee Leaves states:

When an Agency fails to restore an employee within the time limit specified or refuses to restore the employee, the Agency must immediately:

1. Notify the employee in writing;
2. Give the reasons for not restoring;

3. Inform the employee of the right to appeal to the Commission, the time limit for filing an appeal and the address of the office of the Commission to which an appeal should be sent; and
4. Send a copy of the notice to the Commission.

FPM Appendix A

that the illness was work-related. Accordingly, those rights apply to Plaintiff.

C. Statement and Case Law Permit Plaintiff To File Directly in District Court

The applicable statutory provision, 5 USC Section 8151, states in pertinent part:

> "(a) In the event the individual renews employment with the Federal Government, the entire time during

which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under regulations issued by the Office of Personnel Management

(1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation . . . the right to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the right to tenure [and] promotion . . . ."

The purpose of this provision is to put workers in the position they would have been in had they not been injured.

Raicovich v. United States Postal Service, 675 F.2d 417 (1982).

In Metsopulos v. United States Postal Service, 33 MSPB 536, 539 (1987), the Board held it was the agency's burden to submit evidence regarding available positions (including competitive supervisory positions, if at issue), and any restrictive qualification requirements, in order to show that it has made all reasonable efforts to re-employ a recovered employee.[8] See also, Whitfield v United States Postal Service, 5 MSPB 239 (1981).

As for the earlier compensation award, this is covered by 5 CFR 353.307, which entitles an employee whose

recovery takes longer than one year to priority consideration for restoration to the position, in view of an application for reappointment made within 30 days after compensation ceases. The request requirement is waived, however, where the agency's in the case at bar, fails to advise the employee "of his rights, obligations, and benefits relating to his Government employer." 5 CFR 353.106.9 Thompson v United States Postal Service, MSPB Decision DAQ 353.9902 (1981).

At the very least, Plaintiff can establish by non-speculative evidence that he would have been promoted, Boese v. Department of the Air Force, 784 F. 2d 388, 390 (Fed. Cir.).

[8]Metsopulos was determined under Section 8151(b)(2) which is analogous to 8151(b)(1), the subject section at bar.

[9]Thus, for example, Plaintiff should have been reinstated at a higher level prior to the settlement agreement. In view of the fact that the IRS chose to give Plaintiff a lump sum award, taxable at the higher rate, in conjunction with the settlement agreement, had Plaintiff been reinstated on a timely basis, he would not have lost half his salary to taxes. Of course, this is in addition to the harm Plaintiff suffered when he was denied reinstatement after his first period of compensable illness.

1986), a requirement which the Hoese case found that Plaintiff did not sustain, although that judgment was made following a trial before the KSPB. Evidence that the individual is able to perform the duties of the higher-graded positions for which tie seeks retroactive promotion is significant.

Naekel v. Department of Transportation, FAA, 850 F.2d 682, 684 (Fed. Cir. 1988).

Although Naekel suggests that now Plaintiff may have to demonstrate he would have obtained the position, the application of Metsopulos and Whitfield. as well as Section 8151(b)(1), demonstrates that where the agency fails in its burden to provide Plaintiff with relevant information to permit him, to proceed with promotion(s), Defendants have rendered it impossible for Plaintiff to meet that particular burden. "Each promotion made under this section is to be effected on the day it would be effected if the employee were present." FPM Subchapter 2-3-2(b).

Plaintiff never applied for

promotion because Defendants failed to tell him he could apply, and did not tell him the positions he could apply for. By violating the rules which require Defendants to advise Plaintiff of his rights, the Defendants themselves created the situation which prevented Plaintiff from obtaining the promotions, promotions for which Defendants themselves have acknowledged he is eligible.[10]

10/It is clear that Plaintiff was qualified for at least Grade 13 positions. In 1971, 90.8% of his work was at Grade 13 or above. In 1979 he was on a qualified for GS-13 promotion roster. In October 1989, he was declared eligible for a GS-13 promotion. Exhibit C. Thus, all Defendants' allegations concerning Plaintiff's claimed performance deficiency accomplishes is the creation of a genuine issue of material fact,

rendering this unsuitable for summary disposition. See, also, Dxhibit D to Defendants' Brief.

In Wall v. United States, 871 F.2d 1540, 1542, 1543 (10th Cir. 1929), relied on by defendants, the Court found "the matter is not necessarily free of all doubt", but ruled, however, that Plaintiff can file a both request for review of an unfavorable Board decision or a suit alleging discrimination in District Court. This thus supports, not a claim for lack of jurisdiction but an argument to hold the case in abeyance. See also, Synan v. Merit System Protection Board, 765 F.2d 1099 (Fed. Cir. 1985) (Plaintiff is entitled to a trial de novo on the discrimination

issue after the Board decides.); Tolliver v. DeNiro, 290 F.2d 1394 (9th Cir. 1986).

However, Plaintiff always has the right, as does Plaintiff at law, to file a civil rights case in the District Court, separate and apart from the Board decision. E.g., Christo v. Merit System Protection Board, 667 F.2d 882 (10th Cir. 1981); Wall, 871 F.2d at 1545-1546 (dissent). This then supports the position that the Court may proceed with this action quite independently of the MSPB decision.

Defendants' Motion should be denied.

ROY, SHECTER AND VOCHT, P.C.

By:_____
LYNN H. SHECTER (P-24845)
Attorney for Plaintiff
877 South Adams, Suite 302
Birmingham, Michigan 48009
(313) 540-7660

Dated: March 6, 1980

APPENDIX

The Federal Personnel Manual provisions in effect during the required time period provide:

> "Agencies are required to safeguard the rights of employees who are absent because of compensable injury or military duty, whether the employees have been separated, furloughed, or placed on leave of absence. To this end, agencies must take the actions specified in this subchapter, as appropriate, and maintain the records necessary to assure that the rights granted these employees by law and regulation are preserved."

FPM Subchapter 3-1

> "When employees sustain a compensable injury the agency must tell them .... about .... restoration rights, how to exercise them, the time limit, and how, where, and when to appeal to obtain those rights. Employees going on leave of absence must know exactly when to report for work after recovering from injury .... On things employees must decide fro themselves, they should have all the information necessary to make a good decision, for example,

decisions on what to do about rights under the life insurance and health benefit programs, right to be paid for annual leave or to permit it to remain to their credit until returning, and the right to leave their retirement deductions or to take a refund"

FPM Appendix A-1(e)

"If any employee has recovered within one year after the date of compensation begins... the employee is entitled to resume his or her former or an equivalent position."

FPM Subchapter 2-6(A(1)

"Note: The 1-year period referred to in this section means 1 year from the date compensation would ordinarily begin. For example, if the employee fully recovers, but the Department of Labor has still not determined if the claim is compensable, the agency should generally accord the employee the rights specified herein pending the Department's determination.

FPM Subchapter 2-6(a)(4)

"If an employee's recovery takes longer than one year from the date

compensation begins, the last employing agency must make all reasonable efforts to place, and must accord priority to placing the employee in his or her former or an equivalent position ...."

FPM Subchapter 2-6(a)(3)

"Restoration right is agency wide. The responsibility for restoring an employee rests on the agency, not just the installation the employee left because of compensable injury or military duty. An employee must be restored if there is an appropriate position anywhere in the agency.

FPM Subchapter 4-2(b)

"An agency must consider absent employees for every promotion they would be considered for if they were present."[11]

FPM Subchapter 3-2(a)

11/This did not happen. The agency did not notify Plaintiff of promotional opportunities. If he did not know, he couldn't apply. Having thus deprived him of the opportunity to apply, Defendants take the position that they are absolved of liability because

Plaintiff never applied. Exhibit A Defendants' Answers to Interrogatories. Additionally, had Plaintiff rightfully and timely been reemployed he would not have lost the opportunity to advance in his career.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES E. GAVETTE

Plaintiff,

Case No.
89-CV-71021-DT

v.

HON. AVERN COHEN

SECRETARY OF UNITED STATES,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,

Defendant.

ROY, SHECTER AND VOCHT, P.C.
LYNN H. SHECTER (P-24345)
Attorney for Plaintiff
877 South Adams, Suite 302
Birmingham, Michigan 48009
(313) 540-7660

FRANCIS L. ZEBOT (P-22700)
Assistant U.S. Attorney
Attorney for Defendant
817 Federal Building
Detroit, Michigan 48226
(313) 237-4777

PLAINTIFF'S ANSWERS TO DEFENDANTS' FIRST INTERROGATORIES

NOW COMES the Plaintiff, CHARLES E. GAVETTE, by and through his attorneys, ROY, SHECTER AND VOCHT, P.C., and for his answer to Defendants' First Interrogatories, states as follows:

These answers are made without waiver of, and with preservation of:

All questions as to competency, relevancy, materiality,

"Each promotion made under this section, is to be effected on the day it would be effected if the employee were present.

FPM Subchapter 3-2(b)

The applicable statutory provision 5 USC A Section 8151, states in pertinent part:

> "(a) In the event the individual renews employment with the Federal Government, the entire time during which the employee was receiving

compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based on length of service."

(b) Under regulations issued by the Civil Service Commission.

> (11) The department or agency which was the employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation .... [t]he right to resume his former or an equivalent position as well as all other attendant rights which the employee would have had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, [and] promotion .... " (emphasis added)

"(2) The department or agency which was the employer shall, if the injury or disability is overcome within a period of more than 1 year after the date of commencement of compensation, make all reasonable

> efforts to place and accord priority to placing the employee in his former or equivalent position within such department or agency, or within any other department or agency."

privilege and admissibility of the answers and the subject matter thereof as evidence for any purpose in any further proceeding in this action (including the trial of this action) and in any other action;

The right to object on any grounds at any time to a demand or request for a further request to these or any other interrogatories or other discovery proceedings involving or relating to the subject matter of the interrogatories herein responded to; and

The right at any time to revise, correct, add to, supplement or

clarify any of the answers contained herein. The following answers (and any further answers to these interrogatories or to their subject matter) are made expressly without acknowledgment of materiality or relevance of the interrogatories or that the Interrogatories are in an way reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORIES

1. Please indicate the date upon which you received a copy of the Equal Employment Opportunity Commission (EEOC)'s Denial of Request to Reopen dated February 22, 1989 in Charles E. Gavette v. Nicholas Brady Secretary of the Treasury (EEOC Request No. 05890016;

EEOC Appeal No. 01882445; Agency No. 88-1082).

I received the Denial of Request to Reopen on March 6, 1989.

2. Please indicate the date upon which you received a copy of the EEOC's Denial of Request to Reopen dated February 22, 1989 in Charles E. Gavette v. Nicholas Brady, Secretary, Department of the Treasury (EEOC Request No. 05890057; EEOC Appeal No. 01883024; Agency No. 88-1099).

I received the Denial of Request to reopen on March 4, 1989.

_____

CHARLES E. GAVETTE

Subscribed and sworn to before me
this _____ day of January, 1990.

_____
CANDICE B. WIGGLE, Notary Public
OAKLAND COUNTY, Michigan
My Commission Expires: 02/25/91

ROY, SHECTER AND VOCHT, P.C.

By: _____
LYNN H. SHECTER (P-24845)
Attorney for Plaintiff
877 South Adams, Suite 302
Birmingham, Michigan 48009
(313) 540-7660

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

OFFICIAL BUSINESS
Penalty for private use $300

POSTAGE AND FEES PAID
Equal Employment Opportunity Commission

Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON. DC. 20507

OFFICIAL BUSINESS
Penalty for private use $300

POSTAGE AND FEES PAID
Equal Employment Opportunity Commission

Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

MEMORANDUM

to: Mr. Charles E. Gavette
Field Audit Group 3-5
thru: Audit Division
from: Acting Chief, Personnel Branch

subject: Position Classification Appeal

In accordance with IBM 0511.52 and related directives, we have completed our review of the facts on which your position classification appeal is based. In your appeal you have stated that you believe your position is improperly classified as Internal Revenue Agent GS-512-11 (SPD-226) and should be classified as Internal Revenue Agent GS-512-12. We have sustained your appeal.

You have stated that you agree that SPD-226 is properly classified as Internal Revenue agents-512-11 but that SPD-226 is in appropriate for your position since you believe your workload exceeds the kind of work described as typical of the GS-11 level, and equates more accurately to the GS-12 level as described in GS-512 Internal Revenue Agent classification standards published by the U.S. Civil Service Commission.

Mr. John Sommer, Position Classification Specialist, visited you at your work

site on January 4, 1972 to desk audit your position. He examined with you and with your supervisor, Mr. Ralph Wilson, duties and responsibilities of your position, the amount and degree of supervision exercised over your position, and your workload for the current period, and for calendar years 1970 and 1971.

Our findings are as follows:

1. We find that your work has been properly assigned following accepted management practices.

Your workload consists of assignments tentatively evaluated under the grade-level-of-case criteria contained in IRM supplement 4(10)G-3. At the time of assignment, approximately 75% of your cases have been tentatively evaluated at GS-11 level and approximately 25% have been tentatively evaluated at GS-12 level.

2. Analysis of your completed cases during the calendar years 1970 and 1971 discloses that well over 50% of your cases were evaluated at GS-12 and GS-13 level upon completion. (In 1970 the cases above GS-11 level constituted 74.3% of your direct examination time and in 1971 cases GS-12 level constituted 90.8% of your direct examination time.

3. In our opinion, the tentative grade level of cases were properly identified when assigned to you. The differences between tentative grade level of cases and completed grade level of cases are the result of your investigative ability, initiative, and determination to develop all the significant issues in each case. We find this is clearly due to your impact on the job.

4. We feel that your position should be re-classified from Revenue Agent GS-512-11 (SPD-226) to Revenue Agent GS-512-12 (SPD-227). The standard position description (SPD-227) has been certified as a complete accurate description of your duties by you, your supervisor Mr. Wilson, and by the Position Classifier Mr.Sommer.

As required under current grade control procedures, a request for permission to fill a vacant GS-12 position will be forwarded to the Central Region.

Gordon Young

INTERNAL REVENUE SERVICE
MEMORANDUM

date: MAY 01 1979

to: Charles Gavette

from: Banking Official

subject: MPA#22-79
Position Internal Revenue Agent,
GS-512-13
POD: Detroit, Dearborn, Mt.
Clemens, Pontiac and Southfield

I would like to express my appreciation for your application for the above position.

You were ranked ____ Best-Qualified ____
Highly-Qualified ____ Qualified ____ for
the position.

After careful consideration of
Best-Qualified candidates, the following
selection(s) was/were made.

None 6 month roster
This determination should not prevent
you from applying for other vacancies.
Counseling regarding our status in the
ranking process may be obtained from
your manager.

Paul C. Lally
EXHIBIT A-14

Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

January 27, 1986

Mr. Arthur Shahly
Chief Personnel Branch
Internal Revenue Service
Employment Programs Section
P.O. Box 32500
Detroit, Michigan 48226

Dear Mr. Shahly:

I am hereby providing your office of Internal Revenue Service my request to be returned to duty immediately. I am ready, willing and able to return to work as an Internal Revenue Agent.

This request is made pursuant to a federal employees immediate reemployment right, following an injury or illness caused by factors or conditions of employment.

I further request consideration for reemployment pursuant to any and all other reemployment rights I possibly may be entitled to. I request Internal Revenue Service timely advice and/or counsel me of any and all reemployment rights I might possible be entitled to,

under any Federal laws or regulations.

Sincerely,

C. E. Gavette

CEG/ch

Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

January 27, 1986

Mr. Arthur Shahly
Chief Personnel Branch
Internal Revenue Service
Employment Programs Section
P.O. Box 32500
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under any Federal laws or regulations.

Sincerely,

C. E. Gavette

CEG/ch

Internal Revenue Service
Department of the Treasury
477 Michigan Ave.
Detroit, Michigan 48226

Person to Contact: Lynn Wilton
Telephone Number: 226.6459

Mr. Charles Gavette
6816 Bluegrass
Clarkston, Michigan 48016

Refer Reply to: RM:P:LMR
Date: Feb 20 1986

Dear Mr. Gavette:

This is in response to your letter of January 27, 1986, requesting you be returned to duty.

As you have been previously advised, it is our position that as of February 1, 1985, you are retired on disability. As noted in Clarence Barne's letters of October 24, 1985, and November 27, 1985, by John A. Freeman, Assistant Regional Counsel, under Title 5 C.F.R. Section 831.502(f)(1) "a disability annuitant say be reemployed in any position for which he/she is qualified." Part 306 of Office of Personnel Management Regulations also provides that an agency

may hire a disabled annuitant, prior to a finding by OPM that the individual is recovered. Such reemployment, however, is solely the agency's election.

We have considered your request for employment. However, we have no available revenue agent positions. You are, of course, free to apply for a position with other agencies.

Sincerely yours,

Arthur Shahly
Chief, Personnel Branch

cc: Regional Counsel

DEPARTMENT OF THE TREASURY
REGIONAL COMPLAINTS CENTER
WASHINGTON

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

TD No. TD No. 88-1099

Dear Mr. Gavette:

On May 28, 1988, you agreed to voluntarily settle your complaint of discrimination by signing Stipulation for Compromise Settlement in Civil Action No. 84-CV-4109-DT. Said settlement agreement further resolves your complaint of discrimination TD No. 88-1099. Therefore, the remedial action agreed upon has already begun and the Regional Complaints Center has terminated the administrative processing of your complaint.

If you have any questions regarding this matter, please contact Elizabeth Richardson of my staff at 376-0394.

Sincerely,

James E. Rogers, Jr.
Director

Mr. Charles E. Gavette
6816 Blue Grass
Clarkston, MI 48016

INTERNAL REVENUE SERVICE
DETROIT DISTRICT

Merit Placement Announcement

SERVICEWIDE PROMOTION PLAN (IRM 0335)
Regional Management Careers Program

TITLE SERIES AND GRADE:
(1) Internal Revenue Agent, Entry Level Management Trainee, GM-512-13

ORGANIZATIONAL LOCATION AND POD:
Examination Division, Office Of the Chief,
POD: Detroit, MI

AREA OF CONSIDERATION: DISTRICT WIDE

DUTIES AND RESPONSIBILITIES: The incumbent will be selected under the Management Careers Program for assignment to an entry level managerial position in a specific functional area of the Examination Division such as a group supervisor. As a member of a cadre or an individual selectee in the career program, incumbent serves as an assistant to a branch chief or other appropriate management official. During this assignment, incumbent is enrolled in a comprehensive supervisory and management training program,

generally of two to three months duration, and upon completion performs a variety of developmental assignments or managerial duties.

QUALIFICATION REQUIREMENTS: GENERAL EXPERIENCE: 4 years of progressive experience which provided a knowledge of generally accepted principles, theory, and practices of accounting and auditing. SPECIALIZED EXPERIENCE: Type A Experience – 2 years in professional auditing or accounting work as described above. Type B – 1 year of Type A work in analyzing and interpreting diversified accounting system for federal tax liabilities. At least one year of experience is required at the GS-12 level to qualify for the GM-13. Experience must have included one year of managerial experience or have demonstrated the potential ability to perform the managerial duties of the position.

SELECTIVE PLACEMENT FACTOR: NONE

BANKING METHOD: Performance Appraisal 3861 or Merit Pay Appraisal Form 6477, Report of Managerial Potential, Form 6568, Management and Executive Career Questionnaire, Form 5459, experience and award, self-development and interviews

(optional)

HOW TO APPLY: Managers should ensure that eligible employees under their supervision are informed in sufficient time to apply (or file Form 4536 for the employee). Employee should advise managers of position interests as well. EMPLOYEES WILL NOT BE ALLOWED TO COMPETE THIS COMPETITIVE ACTION IF THEY HAVE AN UNACCEPTABLE RATING IN A CRITICAL ELEMENT OF THIS POSITION. File Form 4536 with the Personnel Office on or before the closing date. If interested in this vacancy only show announcement number at top right. If you wish consideration for one year show "CONTINUOUS CONSIDERATION" at top right. Please include setup number and stop number on interest card.

OTHER: Applicants are responsible for ensuring that an accurate record of pertinent and awards is documented on Form 4536. "The determination of the payment of location expenses will be made in accord with guidance contained in IRM 0335.2662 and 1703 (Chapter 500)." This is a non/critical sensitive position. A character investigation is required.

Chief, Employment Programs Section
P.O. Box 32500, Stop 5
Detroit, MI 48232

qualified applicants will receive consideration without discrimination for a non-merit such as age, sex, color, religion, national origin, political affiliation, physical. etc.

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